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IN THE

Supreme Court of the United States

October Term 1967
No. 899

INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, LOCAL NO. 1082 AND ITS AGENT, GEORGE TARR,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

International Hod Carriers, Building and Common Laborers' Union of America, Local No. 1082, and its Agent, George Tarr, Petition for a Writ of Certiorari to review the Decision of the United States Court of Appeals for the Ninth Circuit entered in this case on September 29, 1967.

Opinions Below.

The Opinion of the Court of Appeals (App. A. *infra,* pp. 1-10 has not yet been officially reported. The Findings of Fact, Conclusions of Law, and Order of the National Labor Relations Board are reported at 150 NLRB 158 (1964).

Jurisdiction.

The decision of the Court of Appeals was rendered on September 29, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented.

The Board found that the Union and the Employer bargained to impasse over two issues, one of which was a mandatory subject of bargaining and the other was a non-mandatory although lawful subject of bargaining, following which impasse, the Union struck.

The questions presented are:

1. Whether the Board properly held that it constituted a violation of Section 8(b)(3) of the National Labor Relations Act for a Union to bargain to impasse and strike over a non-mandatory but lawful subject of bargaining.

2. Whether the Board properly held that it constituted a violation of Section 8(b)(3) of the National Labor Relations Act for a Union to bargain to impasse and strike over multiple issues, one of which was a mandatory subject of bargaining and one of which was a non-mandatory although lawful subject of bargaining.

3. Whether the Board properly held that it constituted a violation of Section 8(b)(3) of the National Labor Relations Act, *per se*, for a Union to bargain to impasse over its request for a bond to guarantee payment of wages and fringe benefits.

4. Whether Section 8(d) of the Act constitutes a jurisdictional limitation upon the enforcement activities of the Board or constitutes a restriction on the right to strike.

Statute Involved.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth in Appendix B, *infra*, p. 11.

Statement.

A. The Board's Findings of Fact.

References are to the Transcript which was filed with the Court of Appeals.

The collective bargaining relationship between E. L. Boggs Plastering Company and respondent had its inception in 1959 when Boggs became a member of the Contracting Plasterers' Association of Southern California, Inc., which together with other associations was signatory to an industry wide collective bargaining agreement with various locals of the Laborers Union, including respondent. This agreement, by its terms, expired on May 31, 1962. [Tr. 91.]

On June 4, 1962, the various local unions, including the respondent, and the associations, entered into a new five year collective bargaining agreement. [G. C. Ex. 7].

Prior to the negotiation of the new agreement, however, Boggs had disassociated himself from the association and did not become a party to the agreement by reason of any association membership. Thereafter, an agent of Local 1082 went to a job site in Arcadia in June of 1962 and left a copy of the agreement with Wallace A. Rollman, Boggs' foreman. [Tr. 167.]

Nothing further happened until approximately October of 1962 when Tarr came to Boggs' El Monte job site and told Rollman that he was closing the job down

because Boggs didn't have a contract with the Union. [Tr. 169.] Between the two approaches to Rollman, Boggs had joined another employer's association and its representative, Norman Jones, had requested bargaining with the District Council of Laborers of which Local 1082 is an affiliate. [Tr. 54.] As the contract [G. C. Ex. 7] will indicate, the District Council is not a party to such agreement.

The first meeting was in July of 1962. [Tr. 55.] At that meeting Jones was handed a copy of a contract entitled "Plaster Tenders Agreement" and consisting of some 22 pages. [G. C. Ex. 7, Tr. 57.]

Following this meeting of July 30, 1962, another meeting was held on approximately August 15 or 16, 1962. [Tr. 58.] At the second meeting, Jones submitted counterproposals including, among other things, deletion of the subcontract clause, a reduction of the liability of the contractor for payment of fringe benefits, a modification of the transfer clause, a reduction in the effectiveness of the ratio of plaster tenders clause, as well as a bond provision.

The parties met again on October 26, 1962. Jones represented Boggs and Lionel Richman, attorney for the respondent, represented the unions. [Tr. 68.] At the October 26 meeting the parties discussed the subject of the bond and the proposed waiver of responsibility of the general contractor for any delinquencies in the payment of fringe benefits. [Tr. 178-179.] Also discussed was Jones' demand for the waiver of the subcontract clause and Richman's request for additional compensation for the employees in lieu of the union's waiver of the subcontract clause. [Tr. 179.] During the course of the meeting, Richman stated that

it was his position that if the bond related to wages, hours or conditions of employment, it was a proper subject for bargaining. The union was willing to modify the agreement as far as the form of the bond was concerned and the manner of the posting of bond but the union was not willing to drop the entire subject of the bond as a matter for bargaining. [Tr. 178-179.]

The following meeting was set for November 7 at 2 P.M. All of the union representatives were present and waited for Jones to arrive. At approximately 3 P.M. Jones telephoned from the airport and asked if the representatives would wait for him. He was told that the airport was about an hour's drive from the office and that at least half of the negotiators had left. A further meeting was set up for the latter part of November, 1962, at either 1:30 or 2:00 o'clock [Tr. 180.] At approximately 1:30 Jones' office advised Richman that Jones would not be present at the meeting. Richman telephoned Jones and spoke to Jones' secretary who stated that Jones was out and would be back in 20 minutes. He requested that Jones telephone him when he came in but no telephone call was received. Thereafter, the respondents filed charges against Boggs and Jones alleging refusal to bargain. [Tr. 181.]

Following the filing of these charges, Jones agreed to another meeting and this was set for December 28, 1962. This meeting likewise ended with no agreement. [Tr. 182.]

On January 3, 1963, respondent picketed the job site with a sign reading:

> "Elmer Boggs Unfair. No signed agreement. Local 1082."

On January 4, 1963, Tarr visited the job site and spoke to Elmer Boggs. [Tr. 106.] Boggs asked to call Norman Jones and stated he would like to wait until Jones got there. [Tr. 107.] The parties waited until 10:15 and Jones still had not arrived. Boggs said:

> "I will sign the agreement. It looks like Mr. Jones is not going to show up. It looks like we are not going to get together on negotiations, so I will sign the agreement." [Tr. 110.]

B. The Board's Decision and Order.

The complaint issued against the respondents charged, among other things, that respondents had bargained to impasse with the employer over two issues, the incorporation in the agreement of a subcontract clause, and the incorporation in the agreement of a clause requiring a bond to guarantee payment to employees of wages and earned fringe benefits. Following impasse, the union struck.

The Trial Examiner found, among other violations, that the union had engaged in unfair labor practices within the meaning of Section 8(b)(1)(B), 8(b)(3), 8(b)(4)(i)(ii)(A) and (B) of the Act by striking after impasse for the subcontract clause and the bond clause.

The Board overruled all the findings of unfair labor practices except one of the two charges of violation of Section 8(b)(3) as it pertained to the insistence upon the inclusion of a bond clause, but dismissed the charge as it pertained to the subcontracting clause. As to the latter, the Board found that the union had insisted upon the subcontract clause to the point of im-

passe and struck, but held that such action was lawful in the construction industry under Section 8(e) of the Act.

The decree of the Court of Appeals requires the Union to cease and desist from demanding that Boggs comply with the bond provision of the contract and affirmatively ordered Local 1082 to return to the employer the certified check for $1,000 which he posted as a bond, or, if the check had been cashed, to refund $1,000 to the employer plus 6% interest from the date of cashing, and to post an appropriate notice.

C. The Decision of the Court of Appeals.

The Court of Appeals, by a divided court, enforced the Board's order. The majority, in a brief *per curiam* order, relied upon the Board's expertise for the conclusion that a performance bond is *per se* a nonmandatory subject of bargaining and a strike for such an objective is a violation of the Act.

In an extensive and well reasoned opinion, Circuit Judge Ely dissented. In his dissent, he considered all of the cases cited by the majority and showed that, in each case, the issue presented was one concerning a demand for security for persons other than employees or for purposes other than the protection of payment of wages and fringe benefits. Judge Ely would have denied enforcement.

REASONS FOR GRANTING THE WRIT.

I. The Board Exceeded Its Jurisdiction in Determining That It Constituted a Violation of Section 8(b)(3) of the Act for a Union to Strike Over a Non-Mandatory, Although Lawful, Subject of Bargaining.

The Board makes the basic contention that the language of Section 8(d) of the Act in some manner authorizes it under Section 8(b)(3) of the Act to outlaw otherwise lawful economic activity if the goal that economic activity does not constitute a mandatory subject of collective bargaining. Respondent contends that in taking such a position, the Board misinterprets Section 8(d) of the Act. 8(d) was added to the Act in 1947 not to authorize the Board to censor the conduct of others but rather as a restriction upon the conduct of the Board itself. The amendment was designed as a shield from Board over-reaching rather than as a sword for Board wielding.

The legislative history of Section 8(d) of the Act makes it clear that it was adopted as a restraint upon the Board in applying Sections 8(a)(5) and 8(b)(3), rather than restraining the parties in collective bargaining.

> "In 1947, the fear was expressed in Congress that the Board 'has gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counterproposals that he may or may not make' (HR Rep. No. 245, 80th Cong., 1st Sess. 19 (1947).) Accordingly, the Hartley Bill, passed by the House, eliminated the

> good faith test and expressly provided that the duty to bargain collectively did not require submission of counter proposals. As amended in the Senate and passed as the Taft-Hartley Act, the good faith test of bargaining was retained and written into 8(d) of the National Labor Relations Act."
>
> *N.L.R.B. v. American National Insurance Company,* 343 U.S. 395, 404, 96 L. Ed. 1027, 1037.

The Court then emphasized that "Congress should not pass upon the desirability of the substantive terms of labor agreements." (Pp. 407, 408.)

The brief opinion of the narrowly divided Court in *N.L.R.B. v. Wooster Division of Borg-Warner Corp.,* 356 U.S. 342, 2 L. Ed. 2d 823 is not inconsistent with this position. The dissent of Mr. Justice Harlan is peculiarly appropriate to the instant case. He noted:

> "The legislative history behind the Wagner and Taft-Hartley Acts persuasively indicates that the Board was never intended to have power to prevent good faith bargaining as to any subject not violative of the provisions or policies of those Acts." (p. 354, 2 L. Ed. 2d 831.)

Citation by the Board of *Internal Longshoremen's Association v. N.L.R.B.,* 277 F. 2d 681, is of small comfort to the Board, since the issue before the Circuit was not the mandatory or non-mandatory nature of the demand by the Union, but its absolute illegality. In facing the specific issue before the Court, Chief Judge Prettyman observed:

> "As a matter of law the Union cannot resort to economic pressure, including strike action, to

force the Employer to agree to deal with representatives of a unit different from the unit certified by the Board."

The same distinction was made by this Court in describing situations where the non-mandatory subject was also an illegal one. (*Meat Cutters Union v. Jewel Tea Co.*, 381 U.S. 676, 689, 14 L. Ed. 2d 640, 649; *United Mine Workers v. Pennington*, 381 U.S. 657, 664, 14 L. Ed. 2d 626, 633).

The argument for the Board's position rests on the assumption that Section 8(d) expresses a Congressional judgment delimiting the sphere in which parties may use economic power to compel agreement. There is no basis for this assumption in the statute or legislative history and, accordingly, non-mandatory subjects should be deemed fully bargainable if good faith is present. The latter is the view of numerous knowledgeable writers in the field.*

Respondent's position is further strengthened by an examination of those portions of the Act dealing with the right to strike. Section 13 of the Act provides:

> "Nothing is this Act, except as specifically provided for herein, shall be construe so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitation or qualifications on that right." (61 Stat. 151, 29 U.S.C. 163).

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*Feinsinger, *The National Labor Relations Act and Collective Bargaining*, 57 Mich. L. Rev. 807, 826-830; Fleming, *The Obligation to Bargain in Good Faith*, 47 Va. L. Rev. 988, 1005-1006, 1013; Wollett, *The Borg-Warner Case and the Role of the N.L.R.B. in the Bargaining Process*, 12 N.Y.U. Ann Conf on Labor, 39, 42; Duvin, *The Duty to Bargain: Law in Search of a Policy*, 64 Colum. L. Rev. 248, 271-273.

The application of Section 13 was most recently restated on April 17, 1967, by this Court.

> "Finally, important parts of the historic accommodation by Congress of the powers of labor and management are Sections 7 and 13 of the National Labor Relations Act, passed as part of the Wagner Act in 1935 and amended in 1947. The former section assures to labor 'the right . . . to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for 'the purpose of collective bargaining or other mutual aid or protection . . .' Section 13 preserves the right to strike, of which the boycott is a form, except as specifically provided in the Act. In the absence of clear indicia of congressional intent to the contrary, these provisions caution against reading statutory prohibitions as embracing employee activities to pressure their own employers into improving the employees' wages, hours, and working conditions. See *Labor Board v. Drivers Union,* 362 U.S. 274, 4 L. ed 2d 710, 80 S. Ct. 706; *Labor Board v. International Rice Milling Co.,* supra, 341 U. S. at 672-673, 95 L. ed at 1282, 1283; *Labor Board v. Denver Bldg. Trades Council,* supra, 341 U. S. at 687, 95 L. ed. at 1294; *Mastro Plastics v. Labor Board,* supra, 350 U. S. at 284, 287, 100 L. ed at 320, 322."
>
> *Woodwork Manufacturers Assn. v. N.L.R.B.,* .... U.S. ...., 18 L. Ed. 2d 357, 377.

In an earlier discussion of the effect of Section 13, Mr. Justice Brennan noted:

> "Therefore, since the Board's order in this case against peaceful picketing would obviously 'impede'

the right to strike, it can only be sustained if such power is 'specifically provided for' in 8(b)(1)(A), as added by the Taft-Hartley Act. To be sure, Section 13 does not require that the authority for the Board action be spelled out in so many words. Rather, since the Board does not contend that 8(b)(1)(A) embodies one of the 'limitations or qualifications on the right to strike, Section 13 declares a 'rule of construction which cautions against an expansive reading of that section which would adversely affect the right to strike, unless the congressional purpose to give it that meaning persuasively appears either from the structure or history of the statute.' "

N.L.R.B. v. Drivers Local Union, 362 U.S. 274, 282, 4 L. Ed. 2d 710, 717.

At the same term of Court, the Board had already been rebuffed in its contention (here also made) that it could regulate a union's right to engage in lawful economic action by invoking 8(b)(3) and 8(d). The Court quoted Professor and former Solicitor General Archibald Cox who had written:

"Collective bargaining is curiously ambivalent even today. In one aspect collective bargaining is a brute contest of economic power somewhat masked by polite manners and columinous statistics."

Thereafter, the Court went on to say:

"For similar reasons, we think the Board's approach involves an intrusion into the substantive aspects of the bargaining process—again, unless

there is some specific warrant for its condemnation of the precise tactics involved here."

N.L.R.B. v. Insurance Agents' International, 361 U.S. 477, 489, 490; 4 L. Ed. 2d 454, 464.

The Court went on to make the very point that respondents make here—even though the strike might not have been protected activity under section 8(a)(1), that does not convert it into a violation of section 8(b)(3).

"But surely that a union activity is not protected against disciplinary action does not mean that it constitutes a refusal to bargain in good faith. The reason why the ordinary economic strike is not evidence of a failure to bargain in good faith is not that it constitutes a protected activity but that, as we have developed, there is simply no inconsistency between the application of economic pressure and good faith collective bargaining. The Board suggests that since (on the assumption we make) the union members' activites here were unprotected, and they could have been discharged, the activities should also be deemed unfair labor practices, since thus the remedy of a cease-and-desist order, milder than mass discharges of personnel and less disruptive of commerce, would be available. The argument is not persuasive. There is little logic in assuming that because Congress was willing to allow employers to use self-help against union tactics, if they were willing to face the economic consequences of its use, it also impliedly declared these tactics unlawful as a matter of federal law. Our problem remains that of construing 8(b)(3)'s terms, and we do not see how the availability of self-help to the employer has anything to do with the matter." (p. 495.)

In footnote No. 25 at page 496, the Court approvingly quoted a pithy comment from Professor Cox:

> "To say 'there ought to be a law against it' does not demonstrate the propriety of the NLRB's imposing the prohibition."

This tacit reprimand moved out of the footnote state and into the opinion level in *American Shipbuilding Company v. N.L.R.B.*, 380 U.S. 300, 316, 13 L. Ed. 2d 855, 866, when the Court, in the lock-out case, said:

> "However, we think that the Board construes its functions too expansively when it claims general authority to define national labor policy by balancing the competing interests of labor and management."

II. The Board Exceeded Its Jurisdiction in Holding Unlawful a Strike After Impasse Over Mandatory and Non-Mandatory but Lawful Objectives.

The Board and the majority in the Court of Appeals cited *Carpenters District Council of Detroit (Excello Dry Wall Co.)*, 145 N.L.R.B. 663, enf'd 58 L.R.R.M. 2065 (C.A.D.C.) as authority for the proposition that contitioning the execution of a collective bargaining agreement upon the inclusion of a non-mandatory subject of bargaining constitutes a refusal to bargain in good faith. This case is particularity apropos for two points raised by respondent.

Beore a violation of 8(b)(3) could be found, where it is claimed that a non-mandatory subject of bargain-

ing is present, under the Board's own theory, an impasse predicated upon that specific ground must be found.

> "The Trial Examiner concluded that it was not a violation of Section 8(b)(3) for Respondents to insist, as a condition to entering into a collective bargaining agreement, with the Charging Party, Excello Dry Wall Co., that the latter establish a fund of $2,500 to be deposited in a trust or 'escrow' account, as security for the payment of wages to employees of Excello and of contributions to benefit funds on their behalf. We do not agree.
>
> "Since 1940, the Board had consistently and repeatedly held, without qualification and with court approval, that it is an unfair labor practice for either an employer or a union to insist that the other party post a performance bond or its equivalent *as a condition precedent* to entering into a collective bargaining agreement." (Emphasis added.) *Carpenters District Council of Detroit,* 145 N.L.R.B. 663.

The record here fails to support the Board's contention that the respondent and Boggs bargained to impasse over a non-mandatory subject. To the contrary, the Board's own decision, in reversing the Trial Examiner, recognized that the union had also demanded and bargained to impasse for a subcontract clause lawful under the construction industry proviso to Section 8(e) of the Act.

The Court of Appeals majority failed to meet this problem entirely. The dissent found no need to reach it since Judge Ely would have denied enforcement in any event.

This basic important issue remains unresolved. When the union struck to get the subcontract clause and the bond, did the lawful strike under *Woodwork Manufacturers Assn. v. N.L.R.B., supra,* become unlawful?

The Trial Examiner, at page 7 of his Intermediate Report, sets forth at length a letter sent by the attorney for the union to Jones in which the question of additional compensation in lieu of the subcontract clause was raised.

A review of the entire record will indicate that the union displayed incredible patience in delaying some seven months after the expiration of the prior collective bargaining agreement before taking economic action to procure a new agreement. Contrary to the Board, the evidence indicates bargaining to impasse over a multitude of subjects, including at least one specifically found by the Board in its Decision and Order to be lawful and mandatory.

The position which the Board takes in this proceeding is anomalous, to say the least. They would have this Honorable Court say that if a union submitted to an employer a request for increased wages, increased fringe benefits, holiday pay, overtime pay, paid vacations, and premium pay, and in addition added a request for a bond, they would not be permitted to strike as long as any one of their demands was deemed to be a non-mandatory subject of collective bargaining. This position places a premium on "hard bargaining" and is certainly not designed to be conducive to constructive labor relations. The one factor which is present in each

case cited by the Board is the insistence upon a non-mandatory subject as a condition precedent to the execution of the agreement. It is the impasse on the non-mandatory subject which gave rise in all of the other cases to the charge; not the mere existence within a multitude of proposals of a single non-mandatory proposal.

The Court must recognize that it is an industrial fact of life that modern collective bargaining involves a weighing of values in each case. A party will yield on one proposal to enhance its position in obtaining another. An economic factor may be surrended to obtain another benefit.

Now, when extended negotiation has brought the parties to deadlock over a number of proposals submitted by a party, one of which is lawful but non-mandatory, what would the Board have the parties do? Must the proponent withdraw the non-mandatory proposal before striking? And if he does, may he then change his position on other mandatory proposals to compensate for the non-mandatory proposal now withdrawn? If he did, the Board would pounce upon him like a hawk, contending that this last minute change in position violates Section 8(b)(3). The effect upon collective bargaining would be chaotic, for it would require a party to hold in reserve a costly, mandatory proposal to fill in for a non-mandatory proposal to be withdrawn. It would effectively handicap the requirement of "good faith" in bargaining enjoined by Section 8(d) of the Act.

III. The Board Improperly Found the Request for the Bond Was a Non-Mandatory Subject for Collective Bargaining.

As respondent has noted, *supra,* the decision of the National Labor Relations Board in *Carpenters District Council of Detroit (Excello Dry Wall Co.), supra,* is of significant importance to a determination of this cause.

It was not a unanimous decision. On the contrary, it was supported by a bare majority of the Board. The dissenters vigorously denounced the total exclusion of a performance bond as a mandatory subject of bargaining.

> "In evaluating this situation the majority, in our view, accords too much weight to a label. Thus, our colleagues are, in effect, holding that wherever the form of a demand may be construed as in the nature of a performance bond, that demand is necessary outside the area of a mandatory subject of collective bargaining and insistence upon such demand is per se an unlawful refusal to bargain."

This was precisely the pitfall which the Supreme Court warned against in *American National Insurance,* where, after noting that:

> "'. . . at least some of the matters covered by the management functions clause proposed by respondent are conditions of employment which are appropriate subjects of collective bargaining under Sections 8(a)(5), 8(d), and 9(a) of the Act . . .' the Court rejected the Board's per se holding with respect to the management functions clause saying:

> " 'The duty to bargain collectively is to be enforced by application of the good faith bargaining standard of Section 8(d) to the facts of each case rather than by prohibiting all employers in every industry from bargaining for management functions clauses altogether.'
>
> * * * * *
>
> "It is our view that the Supreme Court decisions require utilization of a case by case approach in determining the 'mandatory' status of specific bargaining proposals, rather than a per se approach. We believe that application of a Procrustean standard as to what constitutes a mandatory subject renders a serious diservice to the collective bargaining process. We are mindful of the fact that the field of labor relations is not static but is in a constant state of flux and nowhere is this more clearly manifested than at the bargaining table where the content and form of subjects are constantly evolving. This requires an alertness to new variations which are in reality 'emoluments of value or other benefits accruing to employees out of relationship with the employer.' "
>
> *American National Insurance Co.*, 343 U.S. 395, 408.

Those judicial decisions which support the *per se* position of the bare majority of the Board pre-date 1966. Those decisions presume that a union exists solely for the purpose of negotiating collective bargaining agreements.

The scope of a union's obligation to its members is also the measure of its authority since it is axiomatic

that the obligation to perform an act carries with it the implied authority to do those things reasonably necessary to discharge the obligation. While the Circuits generally have supported the Board's position with regard to the posting of bonds, these decisions pre-date *International Union v. Hoosier Cardinal Corp.*, ... U.S. ...., 16 L. Ed. 2d 192 (decided Jan. 27, 1966). In upholding a union's right to sue on behalf of its members, the Court said, at pages 196 and 197:

> "And indeed, the union's standing to vindicate employee rights under 301 implements no more than the established doctrine that the union's role in the collective bargaining process does not end with the making of the contract."

The union's obligation to its members is the protection of the gains which the members win by reason of their collective action. It is a hollow gain for an employee to receive, on paper, an increase in pay, but find that his pay is not collectible.

For the employee, "bread and butter" issues are at the heart of his "wages, hours and conditions of employment."

This Court found, as mandatory subjects of bargaining, subcontracting of work and abolition of jobs.

> "In this era of automation and onrushing technological change, no problems in the domestic economy are of greater concern than those involving job security and employment stability. Because

> of the potentially cruel impact upon the lives and fortunes of the working men and women of the Nation, these problems have understandably engaged the solicitous attention of government, of responsible private business, and particularly of organized labor."

Fibreboard Paper Prods. Corp. v. Labor Board, 379 U.S. 203, 225, 13 L. Ed. 2d 233, 247, 85 S. Ct. 398, 6 A.L.R. 3d 1130 (concurring opinion of Stewart, J.) cited with approval in *Woodwork Manufacturers Assn. v. N.L.R.B.,*....., U.S. ....., 18 L. Ed. 2d 357, 375.

There is little difference between saving a job and saving a pay check. Both are essential to the employee. This is especially true in an industry as volatile as the construction industry.

Rather than applying a *per se* rule, the Board should consider this Court's rationale in *United Mine Workers v. Pennington, supra,* wherein this Court said that the ability of the employer to pay was a factor to be considered in determining the lawfulness of collective bargaining objectives under the Sherman Act.

If the bond sought is reasonably within the employer's ability to furnish and reasonably necessary to ensure payment of wages, it becomes as much a mandatory subject as a guaranteed minimum wage, a guaranteed annual wage, or any other guarantee of wage benefit.

Conclusion.

The decision below takes from unions the right to strike without any Congressional sanction for the deprivation. It takes the handcuffs fashioned by Congress to restrain the Board and clamps them upon innocent parties. In a word, it makes of the Board a super-policeman over the field of labor relations, a position which Congress clearly indicated in Section 8(d) that it should not hold.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LIONEL RICHMAN,
LEWIS GARRETT,
HERBERT M. ANSELL,
GERALD ANSELL,
DALE E. ORDAS,
Attorneys for Petitioners.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

National Labor Relations Board, *Petitioner,* vs. International Hod Carriers, Building and Common Laborers Union of America, Local No. 1082 and its agent, George Tarr, *Respondents.* No. 20,775.

[September 29, 1967]

Petition to enforce an order of the National Labor Relations Board.

Before: Chambers, Browning, and Ely, Circuit Judges

Per Curiam:

The Board held that the respondent union violated its duty to "confer in good faith with respect to wages, hours, and other conditions of employment * * *" imposed by section 8(b)(3) and 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(b)(3) and (d) when it refused to enter into a collective bargaining agreement unless that agreement contained a provision requiring the employer to post a performance bond.

The respondent first contends that the evidence does not support the Board's finding that the respondent insisted upon the posting of a performance bond. We think that the record considered as a whole contains substantial evidence to support the Board's finding. See *Universal Camera Corp. v. NLRB,* 340 U.S. 474 (1951).

The respondent next contends that the Board erred in concluding that bargaining for the performance bond

clause did not constitute bargaining "with respect to wages, hours, and other conditions of employment" within the meaning of section 8(d). See *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958).

The Board has uniformly held that bargaining for a performance bond does not fall within the meaning of section 8(d), and that, therefore, the parties may not insist upon such a bond to impasse. These orders have uniformly been enforced, despite challenge. The cases are collected in *NLRB v. American Compress Warehouse*, 350 F.2d 365, 370 n.7 (5th Cir. 1965), and *NLRB v. Davison*, 318 F.2d 550, 555 n.14 (4th Cir. 1963). The basic reason for these rulings were expressed in *Excello Dry Wall Co.*, 145 N.L.R.B. 663, 664 (1963): "The statutory obligation to bargain is not limited and cannot be limited to financially responsible parties, whether employer or labor union."

In the present case the Board did not hold all performance bond clauses to be nonmandatory subjects of bargaining. Respondent had argued to the trial examiner that the performance bond it had sought was different from those involved in the Board's earlier decisions because it was to be a cash bond (rather than a surety bond), and because it was to be conditioned solely upon payment by each employer of the wages and other benefits due its employees. The trial examiner expressly reserved the question of whether such a performance bond clause would have been a mandatory subject of bargaining. He pointed out that the clause involved in this case would have required the contracting employer to pay liquidated damages and to guarantee payment of wages and fringe benefits due the employees of subcontractors of the contracting employer. The

trial examiner held: "a contract which includes an obligation to pay wages of another employer's employees or to pay damages for nonperformance of an employer's obligation * * * would be a nonmandatory subject of bargaining." *International Hod Carriers, Local 1082,* 150 N.L.R.B. 158, 178 (1964). The Board adopted his conclusion.

"Obviously, classification of bargaining subjects as 'terms or conditions of employment' is a matter concerning which the Board has special expertise." *Meat Cutters v. Jewel Tea,* 381 U.S. 676, 685-86 (1965) (opinion of Justice White). We are not convinced that the Board erred in the exercise of that expertise here.

The order of the Board will be enforced.

ELY, Circuit Judge, dissenting:

I respectfully dissent. I expressed my views in a proposed opinion in which my Brothers, after very careful and conscientious consideration, refused to concur. It appears below.[1]

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[1]The National Labor Relations Board petitions for enforcement of an order which directs the respondent union to cease and desist from engaging in conduct found to constitute an unfair labor practice and to take certain affirmative action. Our jurisdiction is supplied by section 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e). The decision of the Board is reported at 150 N.L.R.B. 158 (1964).

For two years prior to May 31, 1962, E. L. Boggs, a plastering contractor, had been party to an agreement with one of the respondent's sister locals. When that agreement expired, Boggs joined the Progressive Plastering & Lathing Contractors' Association, an organization which was formed to provide collective bargaining representation for its members. In June, 1962, a representative of the respondent union appeared at Boggs' jobsite and delivered a copy of a proposed contract to Boggs' foreman. The foreman delivered the contract to Boggs, in compliance with the

(This footnote is continued on the next page)

union representative's instructions, but Boggs refused to sign it. Shortly thereafter, the Association, acting for Boggs and its other members, entered into negotiations for a new contract with the Southern California District Council of Laborers, of which respondent was a member. No agreement was reached. The reason for the failure of these negotiations, and the reason for Boggs' unwillingness to sign the contract which had been offered to him earlier, was the union's insistence that it would not agree to a contract which did not contain a provision for a performance bond. During the period of the negotiations between the Association and the District Council, one Tarr, the respondent local's business representative, approached Boggs and, attempting to persuade him to sign a contract containing a performance bond clause,[1] threatened a work stoppage. When Boggs persisted in

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[1]The provision, in its entirety, reads:

ARTICLE X

BOND

A. A cash bond in the amount of One Thousand Dollars ($1,000) shall be deposited by the individual Contractor with the Joint Conference Board, or a trustee designated by the Joint Conference Board. Said bond shall be liable for any assessment for wages, vacation payments, liquidated damages as provided for in this Agreement, and/or contributions for medical, hospital, welfare and life insurance plans, pension plan, and for employee benefits as provided for in this Agreement, as directed by the Joint Conference Board after hearing and vote as provided for in this Contract.

B. In lieu of the individual bond hereinabove provided, the Contracting Plasterers Association of Southern California, Inc. may furnish a cash bond in the amount of Twenty Thousand Dollars ($20,000) and the Orange County Lathing and Plastering Contractors Association, Inc. may furnish a cash bond in the amount of Ten Thousand Dollars ($10,000) each bond to be liable as hereinabove provided for any and all of their members respectively in good standing. Said Associations' bonds in the amount above set forth shall in no event be liable for any contractor member of either of said Associations covered by said bonds in excess of One Thousand Dollars ($1,000).

C. The Contracting Plasterers Association of Southern California, Inc. and any other association authorized hereunder to post a bond on behalf of its members with the Joint Conference Board shall provide a list of all of its members who are covered by said bond to each of the seven (7) Locals signatory hereto and to the Joint Conference Board. Any changes in membership, either by additions to or by withdrawals from, shall immediately be com-

(This footnote is continued on the next page)

his refusal, Tarr carried out the threat and set up a picket line around the jobsite. Boggs then agreed to sign the contract upon the understanding that he might give a certified check to satisfy the bond provision and that the check would be held, uncashed, pending an agreement between the Association and the District Council for a blanket bond covering all the Association's members.

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municated to the seven (7) Locals and the Joint Conference Board.

D. The bond of the individual contractor and the bonds of the Contracting Plasterers Association of Southern California, Inc. and the Orange County Lathing and Plastering Contractors Association, Inc. shall at all times be maintained in the full amount hereinabove set forth.

E. In addition to the bond herein required, the individual contractors shall file with the Union their social security and unemployment account numbers and certificate of compensation insurance.

F. The Joint Conference Board shall have the right to hear and determine and levy on all bonds in all matters concerning this Agreement in the manner provided for in Article XII hereof.

G. The Joint Conference Board shall not be required to assess any bond for the payment of wages that are due and payable to an employee under the terms of this Contract for any period prior to twenty-one (21) days immediately preceding the submission of said claim for unpaid wages to the Joint Conference Board.

H. The terms and conditions of the bond as provided by this Article shall be as follows: Cash Bond. A cash bond shall be deposited with the Joint Conference Board or a trustee designated by the Joint Conference Board, said bond to be subject to any assessment for wages, vacation payments, liquidated damages as provided for in this Agreement, and medical, hospital, welfare and life insurance plans, pension plan, and for employee benefits as provided for in this Agreement, as directed by the Joint Conference Board after hearing and vote as provided for in this Agreement.

1. Said bond principal once deposited shall be refunded when this Agreement has been terminated, or upon application to the Joint Conference Board after satisfactory proof that the Contractor is no longer contracting within the jurisdiction of any Local Union signatory hereto.

2. Upon application and satisfactory proof to the Joint Conference Board, the principal of the bond shall be refunded at the end of the yearly quarter.

3. No bond shall be required to be refunded sooner than sixty (60) days after application to the Joint Conference Board.

4. The Joint Conference Board or trustee designated by the Joint Conference Board shall have the authority to deposit all or

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After Boggs signed the contract and delivered the check, the picket line was removed.

The Board held that the respondent's insistence upon a performance bond clause, as evidenced by its position at the bargaining table and by its subsequent picketing to obtain such a clause, violated section 8(b)(3) of the National Labor Relations Act, 29 U.S.C. § 158(b)(3). The order requires that the respondent cease and desist from its insistence upon the inclusion

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any part of said funds so received in a savings or commercial bank account together with funds received from other Contractors or the Joint Conference Board, or trustee designated by the Joint Conference Board, shall have the authority to invest not more than seventy-five per cent (75%) of said funds together with funds received from other contractors in United States Government Bonds, certificates of deposits, insured savings and loan associations or such investments approved for trust funds.

5. The Joint Conference Board or the trustee, as the case may be, shall collect all income received by reason of interest or otherwise derived from the investment or deposit of said funds.

6. The income shall be disposed of as follows:
   a. Payment of all expenses for administration of said fund.
   b. Payment of taxes of all kinds.
   c. Any balance of income shall be paid to the Pension Trust.

7. The depositing contractor or Association shall bear the tax assessments on capital gains on his proportion of said fund, if any, and shall also pay any other taxes levied on his proportionate share of said fund, if any.

8. A valuation of the principal fund shall be made quarterly to determine gain or loss affecting the contractor's deposit.

9. The trustee, if acting at the disgnation of the Joint Conference Board, shall disburse the principal or any portion thereof at the direction of the Joint Conference Board, and in order to pay any contractor's obligations as hereunder stated, said disbursements by the Joint Conference Board shall be made in the amounts and to the payee as directed.

10. The refund of the contractor's deposit upon direction of the Joint Conference Board shall be less any authorized principal disbursements, after which the balance would be revalued according to the profit or loss indicated by valuation of the principal fund.

11. All income, after payment of expenses, fees and taxes shall be distributed to the Pension Trust annually and at the termination of this Agreement. Said income be distributed to the Pension Trust even though by revaluation of the fund there has been determined to be a capital loss. That is to say, the income under no circumstances shall be used to reduce any capital losses or for the purpose of paying any portion of dsibursements for wages, welfare, or any levy directed by the Joint Conference Board.

of a performance bond clause in its contract with Boggs or upon Boggs' compliance therewith and that it return to Boggs the certified check which he had delivered to Tarr. The order further requires that if the check has been cashed the respondent shall repay its face amount, together with interest from the date of cashing. Respondent contends that the determination that is conduct violated section 8(b)(3) was erroneous.[2]

Section 8(b)(3) of the act imposes upon a labor organization and its agents the duty to bargain collectively with the employer.[3] Section 8(d), which defines that duty, requires that the employer and the representatives of the employees "confer in good faith with respect to *wages, hours, and other terms and conditions of employment. . . .*" (Emphasis supplied.) While collectively bargaining need not be confined to the italicized subjects, called "mandatory subjects," the refusal to enter into an agreement on the ground that it does not include some proposal which is not one of the "mandatory" subjects of bargaining constitutes a violation of the duty to bargain collectively. *Labor Board v. Borg-Warner Corp.*, 356 U.S. 342, 349, 2 L.Ed.2d 823, 78 Sup.Ct 718 (1958). It was only by application of this rule that the Board determined that respondent had committed an unfair labor practice. The Board expressly rejected a finding by the Trial Examiner that the respondent had been guilty of a general refusal to bargain in good faith by adopting a "take it or leave it" attitude. 150 N.L.R.B. at 161-163.

Respondent's main contention here is that the performance bond provision falls within the range of mandatory bargaining subjects and that, therefore, insistence therefor is not improper. It also urges that, even if the subject is non-mandatory, its insistence upon the clause was not of such a nature as to justify application of the rule of *Borg-Warner*. Agreement was not prevented by its demand for a performance bond, respondent argues, but by the inability of the parties to agree on several proposals, some clearly within the area of mandatory bargaining. We have examined the record. It fully supports the Board's determination that the failure of negotiations resulted from respondent's insistence upon a contractual provision for a performance bond. Our decision must turn on whether respondent's particular performance bond proposal was a subject included within the language, "wages, hours, and other terms and conditions of employment." If not, the finding of unfair labor practice must be upheld.

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[2]Additionally, respondent asserts that since the check was issued to provide security to several labor unions jointly, the order against the respondent alone, where the other beneficiaries of the security arrangement were not joined as parties respondent, is inappropriate. We do not reach this contention.

[3]Section 8(a)(5), 29 U.S.C. § 158(a)(5), imposes the reciprocal duty to bargain upon the employer.

Petitioner contends that the status of performance bonds as non-mandatory subjects is settled, and, indeed, the assertion has been made by the courts. See, *e.g., N.L.R.B. v. Davison,* 318 F.2d 550, 555 (4th Cir. 1963). We have discovered only one decision, however, in which such a broad statement of the proposition was necessary to the result which was reached. In *Carpenters' District Council of Detroit,* 145 N.L.R.B. 663 (1963), *enforced,* 58 L.R.R.M. 2064 (D.C. Cir. 1964), the Board held that "insistence upon any performance bond . . . is *per se* an unlawful refusal to bargain." 145 N.L.R.B. at 667. With the exception of that case, the decisions cited by petitioner in support of its position are distinguishable from the matter at bar. *Jasper Blackburn Products Corporation,* 21 N.L.R.B. 1240 (1940), the progenitor of the line of authority upon which petitioner relies, declared that the employer, by insisting upon a performance bond, had refused to bargain in good faith. In that case, however, the underlying reason for the decision was the determination that the purpose of the employer's insistence for the bond was to thwart agreement generally.[4] Offering a proposal with such intention and purpose, regardless of the mandatory or non-mandatory nature of the subject matter of the proposal, constitutes an unfair labor practice. See *N.L.R.B. v. Herman Sausage Co.,* 275 F.2d 229 (5th Cir. 1960). As to the performance bond itself in *Jasper Blackburn,* the only characteristic which the Board found objectionable was that the employer was enabled, as a condition to agreement, to require, in effect, that the union "pay a tax to a surety company. . . ." 21 N.L.R.B. at 1254. That particular objection is inapposite in the instant case,[5] as a cash bond was accepted. *Jasper Blackburn* did not hold that a performance bond clause does not relate to "wages, hours, and other terms and conditions of employment."

The decisions in *N.L.R.B. v. Davison, supra,* and *Local 164, Brotherhood of Painters v. N.L.R.B.,* 293 F.2d 133 (D.C. Cir. 1961), *cert. denied,* 368 U.S. 824, 7 L.Ed.2d 28, 82 Sup.Ct. 42 (1961), which declared performance bonds to be non-mandatory subjects, appear to us to have derived from the scope of the particular bonds involved in those cases. The proposal in *Davison* was held non-mandatory because it "related to security for the

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[4]"Since the respondent had in 1937 stated its intention not to sign any agreement, and since none of the proposals advanced either by the respondent, or by the Union, called for any performance whatsoever on the Union's part, it would seem clear that the primary purpose of the respondent's demand for a bond was to avoid the required fundamentals of collective bargaining." 21 N.L.R.B. at 1254-55.

[5]Also inapplicable to the instant case, and for the same reason, is the rationale of *N.L.R.B. v. American Compress Ware., Div. of Frost-Whited Co.,* 350 F.2d 365 (5 Cir. 1965), *cert.*

(This footnote is continued on the next page)

contracting party . . . *rather than relating to a benefit or security for the employees.*" 318 F.2d at 556. (Emphasis supplied.) In *Local 164* the union's proposed bond was payable "to the union in the event . . . *that said contractor has committed any substantial breach of this agreement or* has failed to comply with any of the terms or conditions of employment specified thereunder." (Emphasis supplied.) This language, noted the court, indicated that the union itself, in drafting the particular bond provision, recognized that the coverage was to extend beyond "terms and conditions of employment." 233 F.2d at 135. Neither of the objections presented by the facts of these two cases can here be seen.

Our examination of the foregoing authorities leads us to the conclusion that there must be case by case determination of whether a particular performance bond proposal is to be classified as mandatory or as non-mandatory.

Here there is no suggestion that the proposed provision is unlawful, or that, if agreed to by the employer, it would be unenforceable. As we have previously emphasized, the Board expressly overturned the Examiners determination that the respondent had not bargained in good faith.

Resolution of the crucial issue, whether the subject of a performance bond falls sufficiently within the range of the relevant statutory language and is, therefore, a mandatory subject which may be disputed to impasse without engagement in unfair labor practice, should depend upon the nature and scope of the bond involved in a given case.[6] The bond here demanded by the respondent union, chargeable only for the payment of wages and fringe benefits which are conceded to be within the range of the mandatory subjects,[7] was clearly intended to insure that those

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denied, 382 U.S. 982 (1966), cited by petitioner. The court wrote,

> "The Company cannot insist to the point of impasse upon an agreement with any person (*including a surety*) other than the Union which is the exclusive bargaining representative for the employees." (Emphasis supplied.) 350 F.2d at 370.

[6]This approach harmonizes with the Supreme Court's view, expressed in *Borg-Warner,* that, even as to non-mandatory subjects of bargaining, "each party is free to bargain or not to bargain, and to agree or not to agree." 356 U.S. at 349. This broadly expressed freedom, however, may be illusory. A proposal on a non-mandatory subject may be offered, of course. If it is rejected, must the offeror not withdraw it, lest his insistence be construed as a refusal to bargain in good faith? See Duvin, *The Duty to Bargain: Law in Search of Policy,* 64 Column. L. Rev. 248, 271-273 (1964); Feinsinger, *The National Labor Relations Act and Collective Bargaining,* 57 Mich L. Rev. 807, 826-830 (1959).

[7]In his Intermediate Report to the Board in the instant case, the Trial Examiner, while recognizing the significance of the

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payments would continue to flow without interruption. Its function binds it so closely to those payments that the bond can clearly and fairly be seen to relate, as do the payments themselves, to "wages, hours, and other terms and conditions of employment." Such a bond, not claimed to be unreasonably excessive,[8] may be insisted upon, even to impasse, if the insistence is in good faith.

We hold that the record, devoid of determination that the respondent's demand was intended to prevent agreement, or was otherwise indicative of actual bad faith in bargaining, does not support the conclusion that an unfair labor practice was committed.

Enforcement denied.

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scope of the bond, was disturbed by the provision that the bond should be chargeable for "liquidated damages." 150 N.L.R.B. at 178. These "damages," provided for in paragraph (D)(1) of Article V of the contract, are assessed for failure to make timely payment into certain employee fringe benefit funds. They are payable to the particular funds. In effect, then, the bond provides an alternative mode of payment to funds conceded to be within the range of mandatory bargaining subjects. This aspect of the performance bond does not, therefore, compel a determination that it is not a subject included by the statutory language, "wages, hours, and other terms and conditions of employment."

[8]We agree with the Board that public policy in favor of the collective bargaining process, reflected in the National Labor Relations Act, would not permit such demands for performance bonds as would significantly favor "financially responsible parties." See *Carpenters' District Council of Detroit, supra,* 145 N.L.R.B. at 664. A finding of general refusal to bargain in good faith might be inferred, quite properly, from a party's insistent proposal for a bond excessive in amount or containing unreasonable terms or terms not clearly related to "wages, hours, and other terms and conditions of employment.

APPENDIX B.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq) are as follows:

8(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(3) To refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

* * * * *

8(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with rspect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession; * * *

* * *

13 Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfer with or impede or diminish in any way the right to strike, or to affect the limitations or qualification on that right.

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IN THE

Supreme Court of the United States

October Term, 1967
No. 899

INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, LOCAL NO. 1082 AND ITS AGENT, GEORGE TARR,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

APPENDIX.

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IN THE

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Petitioners,

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NATIONAL LABOR RELATIONS BOARD,

APPENDIX.

Index of Administrative and Judicial Decision.

NOTICE TO ALL OUR MEMBERS AND ALL EMPLOYEES OF E. L. BOGGS PLASTERING COMPANY PURSUANT TO

A Decree of the United States Court of Appeals for the Ninth Circuit enforcing an order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby give notice that:

WE WILL NOT refuse to bargain with Boggs on behalf of his employees in any appropriate unit by insisting upon the inclusion of the bond provision. The bargaining unit is:

All Boggs' plaster tenders working in the geographical area of Los Angeles County, Orange County, Catalina Island, and the following offshore islands if point of embarkation is from Los Angeles or Orange County, namely, Richardson Rock, Santa Cruz Island, Arch Rock, San Nicholas Island, San Clemente Island, San Miguel Island, Santa Rosa Island, Anacapa Island (Channel Islands Monument), and Santa Barbara Island, excluding executives, civil engineers and their helpers, superintendents, assistant superintendents, master mechanics, timekeepers, messenger boys, office workers, or any employees of the contractor above the rank of craft foreman and supervisors as defined by the Act.

WE WILL NOT insist that Boggs comply with the bond provision in its collective-bargaining agreement with us.

WE WILL return or cause to be returned the certified check for one thousand dollars ($1,000) which was delivered by said Boggs and received by George Tarr on behalf of this labor organization or we will refund the proceeds of said check with 6 percent interest from the date the check was cashed.

INTERNATIONAL HOD CARRIERS
BUILDING AND COMMON LABORERS
UNION OF AMERICA, LOCAL NO. 1082
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

Dated ..... By .....
George Tarr, Business Representative

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 849 South Broadway, Los Angeles, California 90014 (Tel. No. 688-5204), if they have any question concerning this notice or compliance with its provisions.

Decision and Order.

Dec. 17, 1964

United States of America, Before the National Labor Relations Board.

International Hod Carriers, Building and Common Laborers Union of America, Local #1082, and Its Agent, George Tarr (E. L. Boggs Plastering Company) and Jones & Jones, Inc., and Progressive Plastering & Lathing Contractors' Association, Cases Nos. 21-CB-1969, 21-CB-2012, 21-CC-549, 21-CC-567.

International Hod Carriers, Building and Common Laborers, Local #1082 (E. L. Boggs Plastering Company) and Jones & Jones, Inc., and Progressive Plastering & Lathing Contractors' Association, Case No. 21-CB-2091.

On August 27, 1963, Trial Examiner James R. Hemingway issued his Intermediate Report in the above-entitled proceeding finding that the Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the Intermediate Report attached hereto. Thereafter, the Respondents filed exceptions to the Intermedite Report and a supporting brief.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record

in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner only to the extent that they are consistent with our decision herein.

The facts are essentially as set forth in the Intermediate Report. Briefly, they disclose that the E. L. Boggs Plastering Company entered the contracting business in July 1959 and the following summer became a party to an existing 2-year collective-bargaining contract between the Contracting Plasters' Association of Southern California, Inc. (hereinafter called the C.P.A.-S.C.), the Orange County Lathing and Plastering Contractors Association (hereinafter called the O.C.L.-P.C.A.), and various locals of the Hod Carriers International affiliated with the Southern California District Council of Laborers, AFL (hereinafter called the District Council). The Agreement was applicable to plaster tenders working for all the employer-members of the two aforedescribed associations in the geographical area of Los Angeles County, Orange County, Catalina Island, and numerous nearby off-shore islands. The Agreement expired on May 31, 1962. Shortly thereafer, on June 4, the parties entered into a new 5-year agreement effective until April 30, 1967. Boggs, however, did not at that time become a party thereto. Accordingly, Remult, assistant business agent of Respondent Local #1082, went to Boggs' Arcadia jobsite in mid-June and gave a copy of the comprehensive, 22-page agreement to Boggs' foreman Rollman with instruction to have Elmer Boggs sign it. Boggs declined to do so. Instead, in July 1962, Boggs joined

another newly-formed association, the Progressive Plastering & Lathing Contractors' Association (hereinafter called the Association). This Association had been formed early that spring at the behest of four contractors,[1] and its membership expanded to nine contractors by early August. The Association exists for the purpose of representing employer-members in collective bargaining with labor organizations; it, in turn, is represented by Jones & Jones, labor relations consultants.

As a result of the Association's notice to Respondent Laborers' Local #1082 that it desired to negotiate a contract, Jones and the Union held four bargaining sessions between mid-July and December 28, 1962. During these meetings there were basically two major topics of discussion. First, the parties considered the recognition problem—was the Union willing to recognize Jones as representative of all nine members of the Association or for only four members thereof.[2] More importantly, as to these four remaining employers, was the Union only willing to recognize Jones on their be-

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[1]Charles Norris Plastering Company, O. H. Hudson Company, Arce-Tickey, and Saltony Plastering Company were the original contractors who went to Norman E. Jones in March 1962 and requested that he form an association.

[2]The Union consistently maintained that it did not recognize Jones as bargaining representative of five of the Association's contractor-members because these five were already bound by the aove-mentioned existing 5-year agreement between the Union and C.P.A.S.C. On the other hand, the Association, apparently for the first time in its November 5, 1962, letter to Respondent's attorney Richman, contended that these five contractors were not bound by the C.P.A.S.C. Agreement "because such Association entered into a five-year agreement wherein the association's bylaws did not allow over a three-year agreement without consent of the Board of Directors. Such consent was given only *after* agreement was reached and not before as bylaws so state." (Emphasis supplied.)

half as individuals or in a multiemployer, association-wide unit? Second, the parties addressed themselves to the possible terms of an agreement. The main substantive areas about which the parties were concerned were the sub-contract and bond provisions. No agreements were reached in those areas. The difficulty stemmed, at least partially, from the fact that the parties were negotiating on the basis of their possible entry into either individual employer contracts or some one multi-employer association-wide agreement and different proposals were submitted with respect to each of these alternative possibilities.

No agreements having been reached in the December 28 bargaining session, the Union struck Boggs' El Monte jobsite on January 3, 1963, in furtherance of its efforts to compel Boggs to sign a contract containing subcontract and bond provisions.[3] Although the parties had extended their efforts toward reaching an agreement between the Union and the whole Association or its individual members, Boggs actually signed the C.P.A.S.C. Agreement.[4] It included those two mentioned provisions.[5] The subcontract clause (Article IC) provided that: "If the Contractors, parties hereto, shall subcontract work as defined herein, provision

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[3]On an earlier occasion, October 5, 1962, Union representative Tarr threatened Boggs that he would shut down the El Monte jobsite unless Boggs signed the C.P.A.S.C. Agreement. At that time Tarr also informed Boggs' employees that Boggs was operating without a contract and advised them that they would be cited before the Union's Executive Board unless they left the jobsite. This incident is reported fully at I.R. III C.2.

[4]Norman Jones, Boggs' bargaining representative, was not present at the jobsite when Boggs signed the C.P.A.S.C. Agreement.

[5]The bond provision, Article X of the C.P.A.S.C. Agreement, is set forth verbatim at I.R. pp. 8-10.

shall be made in such subcontract that said subcontractor be signatory to this Agreement, and abide by all provisions set forth within this Agreement." On these facts, the Trial Examiner concluded that the Union engaged in conduct violative of Section 8(b)(3), (8)-(b)(1)(B), 8(b)(4)(i)(ii)(A) and (B) of the Act.

1. The Trial Examiner found that the Union, in adopting a "take it or leave it" attitude, violated Section 8(b)(3) by a general refusal to bargain in good faith with the Association. He also found that the Union violated 8(b)(1)(B) and 8(b)(3) by picketing Boggs in January 1963, to force him to abandon negotiating through his bargaining representative, the Association by Norman Jones, and then to force Boggs to enter into a separate contract with the Union.

The Respondent contends initially[6] that the Trial Examiner "confused the evidence" and thereby erroneously found an 8(b)(3) general refusal to bargain in good faith violation. In support of its position the Respondent urges that the Trial Examiner failed to perceive that the Union never expressly agreed to recognize or bargain with Jones as representative of the Association *qua* Association but willingly explored the possibility of either an association-wide agreement or individual-employer contracts. Similarly, the Union urges that the Trial Examiner's 8(b)(1)(B) and 8(b)

[6]The Respondent Union also contends that the Board lacks jurisdiction over this dispute (I.R. I.) and that this proceeding should be dismissed because the Union was deprived of an adequate opportunity to consider settlement or other informal proceedings. For the reasons set forth in the Intermediate Report, we find that the Respondent's contention concerning settlement lacks merit. Likewise, the Board's decision in *United Mine Workers of America, et al.*, 96 NLRB 1389, 1390, supports the assertion of jurisdiction herein.

(3) findings as to the alleged coercion of Boggs in his selection of a bargaining representative are wholly unsupported by the record.

We find merit in the Respondent Union's exceptions to these 8(b)(3) and 8(b)(1)(B) findings of the Trial Examiner. It is evidence that these findings are inextricably linked with the assumption that the parties were obligated to bargain for a multiemployer, association-wide agreement. For in concluding that the Union entered negotiations with a "fixed determination not to bargain and with a padlock on its choice of terms and conditions," the Trial Examiner relies essentially on the presence of a "favored nations"[7] clause in the Union's C.P.A.S.C. area agreement. And he found that "it left no room for bargaining" since it precluded the Union from entering into a contract with the Association (as contrasted from individual contractors) which varied to any marked degree from the existing area agreement. Likewise, the Trial Examiner rested on this same assumption[8] his opinion that "Tarr had no legal right to approach Boggs separately about

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[7]See the Trial Examiner's discussion of the impact of the "favored nations" clause on the Union's attitude toward bargaining. The "favored nations" clause (Article IX of the C.P.A.S.C. Agreement) reads: "The Unions shall not sign or work under any agreement with *Employers* of Plaster Tenders in this area giving more favorable terms of working rules than those established for Plaster Tenders under this Agreement." (Emphasis supplied.)

[8]We note that the Trial Examiner cited *The Westchester County Executive Committee*, 142 NLRB 126, and *Cascade Employers Association*, 127 NLRB 488, in support of his above position. In those cases the Board found, in essence, that the Union violated Section 8(b)(1)(B) and 8(b)(3) by striking individual employer-members of a multiemployer association to force them to withdraw from the Association and enter into individual contracts at a time (before impasse) when *the Union was obligated to bargain for an associationwide agreement.*

contract terms so long as no impasse had occurred" and that by picketing Boggs *alone* the Union engaged in "divide and conquer" tactics in violation of 8(b)(1)(B) and 8(b)(3).

We are of the opinion, however, that in the particular circumstances of the instant case the Trial Examiner's reliance upon this assumption is misplaced. For the existence of a miltiemployer unit must be predicated upon the mutual consent of the Union and employers concerned,[9] and it is manifest that this basis is lacking here. Thus, the complaint alleged and the answer admitted that all of Boggs' plaster tenders working in the geographical area of Los Angeles County, Orange County, Catalina Island, and numerous off-shore islands constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act. The testimony of Respondent's attorney Richman as well as the Trial Examiner's findings demonstrate further that Richman told Jones that he would bargain with Jones on an individual employer basis and that Richman never agreed on behalf of Respondent to recognize the Association as an association for purposes of a multiemployer association contract. Significantly, Jones' testimony generally corroborated Richman's and, with respect to the October 26 meeting, Jones in fact testified that "Richman said I'll bargain with you for them [the four contractors not covered by the existing C.P.A.S.C. Agreement] on an individual basis . . . If we can get together maybe we can write it for the whole association . . . *He (Richman) did not say that he recognized the association as an association.*

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[9] *Chicago Metropolitan Home Builders Association,* 119 NLRB 1184, 1186.

He did not say he did not recognize that association. It was left in the air." (Emphasis supplied.) Finally, while the October-December bargaining proceeded in terms of the possiblity of contracting on an association-wide basis, the Board has recently had occasion to point out that the mere fact that parties undertake to explore this possibility by participaing in negotiations with a representative of an association does not automaticallly establish that they had consented to bargain on that basis.[10] In light of all the foregoing, we find that a multiemployer, association-wide unit was not established.

Having thus rejected the basic premise upon which the rial Examiner's rationale was founded, it follows that his rationale must likewise fall. Specifically, having rejected the existence of a multiemployer, association-wide unit, we must necessarily view the allegations of the complaint in another posture—namely, that of a single employer unit. When so viewed, the Trial Examiner's rationale that the Respondent violated 8(b)(1)(B) and 8(b)(3) by engaging in so-called divide and conquer, whipsaw, or divisive tactics when it picketed Boggs alone in January 1963, is clearly inapplicable. Nor can we perceive any other basis for establishing these violations. On January 4, 1963, Business Agent Tarr (described fully at I.R. part III C. 2) encouraged Elmer Boggs personally to sign the C.P.A.S.C. Agreement at a time when Boggs did not have the advice of his bargaining representative, Norman Jones. However, in the circumstances presented herein, this does not, in our opinion, constitute

[10] *The Great Atlantic & Pacific Company,* 145 NLRB No. 39.

coercion of an employer in the selection of his bargaining representative within the meaning of Section 8(b)(1)(B),[11] or a refusal to bargain in violation of 8(b)(3). Additionally, there is no basis for finding that the Respondent's entire pattern of conduct constituted a general refusal to bargain in good faith in a single-employer unit. For even if the "favored nations" clause in Respondent's C.P.A.S.C. area Agreement arguably precluded it from requesting or accepting anything other than an identical agreement,[12] the record demonstrates this would be true only in an association-wide contract and not in a contract with an individual employer. From the record herein it is evident that Respondent willingly met and conferred on numerous occasions with Norman Jones, on behalf of Boggs, and actively participated in an open and frank exchange of ideas and proposals, especially with respect to problems involving recognition, subcontracting, and a bond provision—the three major substantive obstacles to an agreement between the parties. While no agreement was reached at the bargaining table, agreement or concession is not a necessary prerequisite to satisfying the duty to bargain in good faith set forth in the Act. Accordingly, we shall dismiss these allegations of the complaint.

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[11]Cf. *Cheney California Lumber Company*, 130 NLRB 235, 242-243, enfd. 319 F. 2d 375 (C.A. 9); and *Los Angeles Cloak Joint Board (Helen Rose Co., Inc.)*, 127 NLRB 1543.

[12]In exploring the possibility of an Association-wide Agreement, the Respondent, *inter alia, offered to accept an increased wage rate in lieu of the subcontracting clause. The Trial Examiner summarily dismissed this proposal "as a tactic to give an appearance of bargaining knowing that the offer could not be accepted." However, in the instant circumstances, we see no factual basis for adopting this conclusionary language of the Trial Examiner.*

2. The Trial Examiner also found that the Respondent violated Section 8(b)(4)(i)(ii)(A) and (B) of the Act by inducing employees of Boggs to withhold their services from Boggs and by picketing Boggs with the objective of forcing him to sign an agreement containing a subcontract clause (see p. 4, *supra*), falling within the scope of Section 8(e).[13] The Trial Examiner, while recognizing that the instant subcontract clause fell within the construction industry proviso[14] to Section 8(e), nevertheless took the position that coercion to obtain such an excepted clause was violative of both Sections 8(b)(4)(A) and (B) of the Act. In essence, the Trial Examiner's mentioned findings reflected existing Board law as set forth in *Colson and Stevens Construction Company,* (137 NLRB 1650). However, upon reexamining that decision in the *Centlivre* case,[15] the Board overruled the *Colson and Stevens* doctrine and consequently held that picketing to obtain a contract clause within the construction industry proviso to Section 8(e) does not violate Section 8(b)(4)

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[13]Section 8(e) provides: "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void:" . . .

[14]The construction industry proviso to Section 8(e) provides: "Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work:" . . .

[15]*Northeastern Indiana Building and Construction Trades Council (Centlivre Village Apartments)*, 148 NLRB No. 93.

A).[16] As the Respondent's object in inducing Boggs' employees and picketing Boggs was to obtain a contract containing, *inter alia,* just such a clause, we find, contrary to the Trial Examiner, that the instant complaint should be dismissed insofar as it alleged that Respondent violated Section 8(b)(4)(A) of the Act.

Further, the record does not disclose any evidence that the subcontract clause which the Respondent struck to obtain would have forced Boggs to cease doing business with any specific employer or would otherwise have required the disruption of any existing business relationship between Boggs and "other persons," for example, subcontractors within the meaning of Section 8(b)(4)(B). In a word, there is no evidence that Respondent's economic action was aimed at achieving any object other than the limited one of securing a contract with a clause exempted by the construction industry proviso. Accordingly, we further find, contrary to the Trial Examiner, that the instant complaint should be dismissed insofar as it alleged that Respondent engaged in conduct violative of Section 8(b)(4)-(B) of the Act.[17]

3. The Trial Examiner's conclusion that Respondent also violated Section 8(b)(3) by striking for the afore-

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[16]See also *Construction Production & Maintenance Laborers Union, et al. v. N.L.R.B.* (*Colson and Stevens Construction Co.*), 323 F. 2d 422 (C.A. 9); *Essex County and Vicinity District Council of Carpenters, etc. v. N.L.R.B.,* 332 F. 2d 634 (C.A. 3); *Orange Belt District Council, et al. v. N.L.R.B.* (*Calhoun Drywall Company*), 328 F. 2d 534 (C.A.D.C.); *Building and Construction Trades Council v. N.L.R.B.* (*Gordon Fields*), 328 F. 2d 540 (C.A.D.C.). see also *Local Union No. 48 of Sheet Metal Workers v. Hardy Corp.,* 332 F. 2d 682 (C.A. 5).

[17]Cf. *Northeastern Indiana Building and Construction Trades Council* (*Centlivre Village Apartments*), 148 NLRB No. 93, at pp. 3-6.

mentioned subcontracting clause directly stemmed from his conclusion that such strike violated Section 8(b)-(4)(A) of the Act. We have found, however, that by virtue of the construction proviso to Section 8(e) Congress intended to permit unions in this industry to strike for such clauses. It would be anomalous to hold in the instant circumstances that this right was taken away under Section 8(b)(3). Accordingly, we shall also dismiss the complaint insofar as it alleges that Respondent violated (b)(3) by insisting upon the inclusion of a subcontracting clause.[18]

4. Finally, the Board finds, in agreement with the Trial Examiner, that the bond clause was a nonmandatory subject of bargaining and Respondent's insistence upon the inclusion of this clause, as evidence by its position at the bargaining table and in subsequent picketing to obtain a contract containing such a clause, violated Section 8(b)(3) of the Act.[19]

Remedy

In accordance with established Board precedent, we shall fashion a remedy to the specific conduct found

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[18]See *Operative Plasterers' & Cement Masons' International Association (Jones & Jones, and Arnold M. Hansen)*, 149 NLRB No. 106.

Since the Board has not adopted the Trial Examiner's 8(b)(3) finding with respect to the insistence upon the inclusion of a subcontract clause, we need not adopt or rely upon the Trial Examiner's finding that the original charge in Case No. 21-CB-1969, while not expressly referring to an 8(e) clause, adequately notified the Respondent that the 8(b)(3) allegation was in fact based upon the Respondent's insistence on such a clause.

[19]*N.L.R.B. v. Wooster Division of Borg-Warner Corp.* 356 U.S. 342; see also *Carpenters' District Council of Detroit, etc. (Excello Dry Wall Co.)*, 145 NLRB No. 64 (Members Brown and Jenkins, dissenting), enforced by *per curiam* opinion dated June 15, 1964, (C.A.D.C.).

violative of the Act. Thus, as we have only found that Respondent violated Section 8(b)(3) by insisting upon the inclusion of the bond clause and since the contract containing this clause has been executed, we shall order the Respondent to cease and desist from insisting that Boggs comply with this particular provision of the contract. Finally, to restore the parties to the *status quo ante,* we shall order the Respondent to return the $1,000 certified check which Boggs gave to the Union in lieu of a cash bond with the further direction that if the check was cashed the Union shall be liable for 6 percent interest on that amount from the date cashed.

ORDER

Upon the entire record in this case and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, International Hod Carriers, Building and Common Laborers Union of America, Local #1082, its officers, agents, representatives, successors, and assigns, including George Tarr, shall:

1. Cease and desist from:

(a) Refusing to bargain with Boggs by insisting upon the inclusion of the bond clause (Article X) in the contract or by insisting that Boggs comply with said bond clause.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Return, or cause to be returned, to Boggs the certified check for $1,000 which was delivered by Boggs and received by Tarr on behalf of the Union. If the check has been cashed, then refund the $1,000 to Boggs plus 6 percent interest computed from the date said check was cashed.

(b) Post in conspicuous places at the Union's business offices, meeting halls, and all places where notices to members are customarily posted, copies of the notice attached hereto marked "Appendix."[20] Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region, shall, after having been duly signed by an authorized representative of the Union, be posted by the Union immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter. Reasonable steps shall be taken to insure that the notices are not altered, defaced, or covered by any other material.

(c) Sign and deliver sufficient copies of said notice to the Regional Director for the Twenty-first Region, for posting by Boggs, Boggs being willing, at all locations where notices to his employees are customarily posted.

(d) Notify the Regional Director for the Twenty-first Region, in writing, within 10 days from the date

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[20]In the event that this Order is enforced a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

of this Decision and Order, what steps the Union has taken to comply herewith.

IT IS HEREBY FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as the other allegations of the complaint are concerned.

Dated, Washington, D. C. Dec. 15, 1964.

Frank W. McCulloch, Chairman
Boyd Leedom, Member
John H. Fanning, Member
Gerald A. Brown, Member
Howard Jenkins, Jr., Member
NATIONAL LABOR RELATIONS BOARD

(Seal)

APPENDIX

NOTICE TO ALL OUR MEMBERS AND ALL EMPLOYEES OF E. L. BOGGS PLASTERING COMPANY PURSUANT TO A DECISION AND ORDER

of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby give notice that:

WE WILL NOT refuse to bargain with Boggs on behalf of his employees in any appropriate unit by insisting upon the inclusion of the bond provision. The bargaining unit is:

All Boggs' plaster tenders working in the geographical area of Los Angeles County, Orange County, Catalina Island, and the following offshore islands if point of embarkation is from Los Angeles or Orange County, namely, Richardson Rock, Santa Cruz Island, Arch Rock, San Nicholas Island, San Clemente Island, San Miguel Island, Santa Rosa Island, Anacapa Island (Channel Islands Monument), and Santa Barbara Island, excluding executives, civil engineers and their helpers, superintendents, assistant superintendents, master mechanics, timekeepers, messenger boys, office workers, or any employees of the contractor above the rank of craft foreman and supervisors as defined by the Act.

WE WILL NOT insist that Boggs comply with the bond provision in its collective-bargaining agreement with us.

WE WILL return or cause to be returned the certified check for one thousand dollars ($1,000) which was delivered by said Boggs and received by George Tarr on behalf of this labor organization or we will refund the proceeds of said check with 6 percent interest from the date the check was cashed.

INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS, UNION OF AMERICA, LOCAL #1082
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

Dated ..... By .....
George Tarr, Business Representative

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 849 South Broadway, Los Angeles, California 90014 (Tel. No. 688-5204), if they have any question concerning this notice or compliance with its provisions.

Intermediate Report and Recommended Order.

United States of America, Before the National Labor Relations Board, Division of Trial Examiners, Branch Office, San Francisco, California.

International Hod Carriers, Building and Common Laborers Union of America, Local #1082, and Its Agent, George Tarr (E. L. Boggs Plastering Company) and Jones & Jones, Inc., and Progressive Plastering & Lathing Contractors' Association Cases Nos. 21-CB-1969, 21-CB-2012, 21-CC-549, 21-CC-567.

International Hod Carriers, Building and Common Laborers, Local #1082 (E. L. Boggs Plastering Company) and Jones & Jones, Inc., and Progressive Plastering & Lathing Contractors' Association. Case No. 21-CB-2091.

Thomas Canafax, Jr., for the General Counsel.

Richman, Garrett & Ansell, by *Lionel Richman,* of Los Angeles, Calif., for Respondents.

Jones & Jones, Inc., by *Norman E. Jones,* of Los Angeles, Calif., for Charging Party.

Before: *James R. Hemingway,* Trial Examiner.

Statement of the Case

The following charges and amended charges were filed by Progressive Plastering & Lathing Contractors' Association, herein called the Association, and its representative, Golding & Jones, Inc. (or, in later charges, Jones & Jones, Inc., successor to Golding & Jones, Inc.) against International Hod Carriers, Building and Common Laborers Union of America, Local #1082, herein called the Union, and (except in one case) against its

agent, George Tarr, business representative, herein called Tarr, but jointly with the Union called Respondents: On October 18, 1962, and April 30, 1963, in case number 21-CB-1969; on January 7 and April 30, 1963, in case number 21-CB-2012; on October 18, 1962, in case number 21-CC-549; on January 7, 1963 in case number 21-CC-567. Jones & Jones, Inc., also filed a charge against the Union and Southern California District Council of Laborers on April 5, 1963, in case number 21-CB-2091 and, in the same case, an amended charge on April 30, 1963, against the Union alone. The charges, as amended, in the foregoing cases were consolidated,[1] and on May 3, 1963, a complaint duly

[1]Four other cases, 21-CB-2914, 21-CC-570, 21-CB-2023, and 21-CC-581 were included in a separate order of consolidation on May 3, 1963, but were omitted from the document of the same date headed "Order Consolidating Cases, Consolidated Complaint and Notice of Hearing." The formal file includes a "Motion to Vacate Order Consolidating Cases." The motion was dated May 8, 1963, but was apparently filed on May 9, although the date stamp is almost illegible. In this motion the Union objected to the consolidation of the above four cases (which involved another labor organization) with the cases enumerated in the complaint and moved that the order of consolidation be vacated. This motion was concurred in by the other labor organizations, and in a memorandum dated May 13, 1963, counsel for the General Counsel agreed to a severance of the cases enumerated in the complaint from the four additional cases included in the separate order of consolidation. By an order dated the same day—May 13, 1963—the Regional Director referred the motion to the Associate Chief Trial Examinet in San Francisco for a ruling. By telegraphic order dated May 14, 1963, the said Associate Chief Trial Examiner granted the motion to vacate the order consolidating the cases which had been issued on May 3, 1963. This date is the same as that on which the complaint in these consolidated cases (containing an order of consolidation of cases shown in the caption hereof) was issued, and the telegraphic order of the Associate Chief Trial Examiner might be taken to refer to the consolidation shown in the complaint. However, I find that it was intended, and all parties understood that it was intended, to vacate only the separate order of consolidation of May 3, 1963, and did not affect the order of consolidation included in the Complaint.

issued, alleging violations of Section 8(b)(1)(B), 8-(b)(3), 8(b)(4)(i)(ii)(A) and (B) and Section 2(6) and (7) of the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et seq.*, herein called the Act.

The complaint in substance alleged that Tarr, acting on behalf of the Union, on certain stated dates threatened one Boggs, a plastering contractor, with a strike and actually caused said Boggs to be picketed, and caused an employee to cease working, to enforce demands for the Union that Boggs sign an agreement with the Union which would require Boggs to: (1) Cease or refrain from handling, using, selling, transporting or otherwise dealing in the products of other employers and from doing business with other persons; (2) post a bond as security for the performance of the agreement, a subject about which Boggs allegedly was not required to bargain; (3) be deprived of an opportunity to bargain collectively; and (4) be deprived of an opportunity to bargain through the Association as his representative. The complaint also alleged a refusal to bargain.

The Respondents' answer made certain admissions but denied the allegation of paragraph 7 of the complaint that the Union at all times material represented a majority of the employees in the alleged (and admittedly) appropriate unit, and denied all allegations of fact and conclusions constituting the gist of the alleged unfair labor practices.

Pursuant to notice, a hearing was held in Los Angeles, California, on July 8 and 9, 1963, before the undersigned Trial Examiner. At the opening of the hearing, Respondents moved to amend their answer to admit

paragraph 7 of the complaint and to correct errors in the answer in other respects. The motion was granted. Respondents then moved to strike paragraph 9(a) of the complaint on the ground that this was based on amended charges filed in cases 21-CB-1969 and 21-CB-2012 more than 6 months after the date on which the alleged action took place. Following argument, I denied Respondents' motion to strike without otherwise considering the merits of Respondents' argument, because paragraph 9(a) of the complaint was, in any event, supported by a timely charge of violation of Section 8(b)-(3) of the Act. However, I now find it desirable to pass on Respondents' argument. The original and amended charges in Case No. 21-CB-2012 were both filed within 6 months of the time of the occurrence of the events alleged—January 3 and 4, 1963—and the amended charge does support paragraph 9(a) of the complaint. No problem arises with respect to this charge, therefore, under Section 10(b) of the Act. The original charge in Case No. 21-CB-1969 alleged a violation of Section 8(b)(1)(A)(B), (2) and (3) of the Act. The original charge alleged a violation of these sections of the Act by threatening picketing on October 5, 1962, because Boggs would not enter into "the Hod Carriers Agreement." In a separate paragraph, the charge alleged that the action mentioned in the first paragraph was taken by the Union for a number of purposes: to restrain or coerce Boggs in his selection of his collective bargaining representative; to refuse to bargain in good faith with Boggs' collective bargaining representative, and to force Boggs to post a bond—a non-mandatory subject of collective bargaining. The amended charge added to the foregoing (among other

things not complained of by Respondents) that one of the purposes of the action of the Union described in the first paragraph was to force or require Boggs to sign an agreement "with an 8(e) provision which is not a mandatory subject for collective bargaining." The Union claims that, as the original charge did not mention this, the amended charge, filed more than 6 months after October 5, 1962, the date of the threatened picketing, was barred from adding the last quoted portion by Section 10(b) of the Act. Even if there were some merit in Respondents' contention regarding Section 10(b) of the Act, paragraph 9(a) could not be stricken in its entirety, because the charge in Case No. 21-CB-2012 adequately supports paragraph 9(a) of the complaint. However, I find that Respondents' contention is without merit, for the original charge in Case No. 21-CB-1969 adequately notifies the Respondents that it is based on Respondents' refusal to bargain by the attempt to force the "Hod Carriers Agreement" on Boggs. The fact that the charge does not mention that said agreement contained an 8(e) provision is not vital. The charge contained enough information to apprise the Respondents of the nature of the charge against them.

The Respondents followed the foregoing motion with another motion to dismiss the entire proceedings on the ground that the amended charges were received by Respondents on May 2, 1963, and the complaint issued on May 6, 1963,[2] and that the shortness of time intervening deprived Respondents of an adequate opportunity to consider settlement or other informal proceed-

[2]Actually it was issued on May 3 but probably was received on May 6.

ings and deprived them of rights granted under Section 101.7 of the Board's Rules and Regulations. This rule, of course, excludes the affordance of opportunity to settle where time does not permit. However, the Trial Examiner offered Respondents time right then to attempt a settlement. Respondents' attorney stated that he could not do so because no officer of the Union was available to him then to discuss settlement and that he was not authorized to use his discretion in the matter. In argument, it appeared that both before the filing of the amended charges and between the date of the issuance of the complaint and the opening of the hearing the General Counsel had offered Respondents a chance to settle the case. Nevertheless, I proposed to afford further time in which the parties could attempt a settlement if, after the noon recess (when Respondents' counsel would have an opportunity to speak with his principals), Respondents informed the Trial Examiner that they desired time in which to discuss settlement. Following the noon recess, Respondents' counsel stated that he had been authorized by his principals to discuss settlement but that he was not prepared to do so unless the General Counsel would reduce his "minimum terms," which the General Counsel refused to do. (From the reference to "minimum terms," I infer that Respondents had already discussed settlement with the General Counsel.) I find the second motion of Respondents to be groundless. Following rejection of the offer of time in which to discuss settlement, I did not specifically rule on Respondents' motion. I now deny it.

At the close of the hearing, the General Counsel moved to amend the complaint to conform to the proof.

The motion was granted without opposition. The parties waived oral argument, and, upon request of the General Counsel, a date was set for the filing of briefs. Within the time granted, the parties filed briefs, which have been considered by the undersigned.

From my observation of the witnesses and upon the entire record in the case, I make the following:

Findings of Fact

I. The business of Boggs

E. L. Boggs Plastering Company, is a proprietorship operated by E. L. Boggs, herein called Boggs, at Montclair, California, as a plastering contractor in the building and construction industry. In connection with his business, Boggs during a one-year period between February 1, 1962 and January 31, 1963, purchased and received goods, materials, and supplies valued in excess of $50,000 from suppliers that purchased such goods directly from points outside the State of California. Respondents contest jurisdiction of the Board on the ground that the figures used by the Board were barely adequate and that, if jurisdiction were determined on the basis of commerce for the year preceding October 5, 1962, the amount would have fallen $11,000 short. There is no reason to pick such a period in which to determine jurisdiction. The Board has consistently used the figures for the most recent calendar or fiscal year of the employer or for the 12-month period immediately preceding the hearing before the Board.[3] The record does not disclose what fiscal year is used by Boggs, but if a calendar year were substituted and if

[3] *Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local 836,* 128 NLRB 1031.

the evidence consisting of purchases for the month of January 1963 were eliminated and those for January 1962 were included, the totals would still exceed $50,000, although by a narrower margin. Since, therefore, the Board's standards for asserting jurisdiction are met, I find that the Board has jurisdiction and that it will effectuate the policies of the Act to assert jurisdiction.

II. The labor organization involved

The Union is a labor organization representing employees, among others, of Boggs in collective bargaining. Respondent George Tarr is, and at all times material herein has been, a business representative of the Union acting on its behalf.

III. The unfair labor practices

A. *The bargaining unit*

The complaint alleges and the answer admits that "all of Boggs' plaster tenders working in the geographical area of Los Angeles County, Orange County, Catalina Island, and the following offshore islands if the point of embarkation is from Los Angeles or Orange County, namely, Richardson Rock, Santa Cruz Island, Arch Rock, San Nicholas Island, San Clemente Island, San Miguel Island, Santa Rosa Island, Anacapa Island (Channel Islands Monument), and Santa Barbara Island, excluding executives, civil engineers and their helpers, superintendents, assistant superintendents, master mechanics, timekeepers, messenger boys, office workers or any employees of the contractor above the rank of craft foreman and supervisors as defined by the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. I so find.

B. *The Union's majority*

The complaint alleges and the answer, as amended at the hearing, admits that the Union has represented, and presently does represent, a majority of the employees in the unit described above within the meaning of Section 9(a) of the Act. I so find.

C. *The refusal to bargain*

1. Collective bargaining history

Progressive Plastering & Lathing Contractors' Association, herein called the Association, was formed in March 1962 and was incorporated in July 1962. Its purpose was to represent member employers in collective bargaining with labor organizations. Boggs, who in 1960 had signed a 2-year contract (expiring May 31, 1962), with a sister local of the Union (Local 862 in Pomona, California), joined the Association in the latter part of July 1962. Golding & Jones, Inc., and its successor, Jones & Jones, Inc., labor relations consultant, represented the Association. During the month of June, a representative of the Union delivered to Boggs' foreman at the building site of work being performed by Boggs copies of a contract with directions to have Boggs sign them and return them to the Union. Apparently, Boggs did not do so.

In mid-July 1962, the Association notified the Southern California District Council of Laborers, herein called the District Council, of which the Union and a number of sister locals were members, that it desired to negotiate a collective bargaining agreement on behalf of its members. As a result, a meeting was held at the offices of Local 507 in Long Beach, attended by Norman E. Jones of Golding & Jones, Inc., for the Asso-

ciation, and by representatives of the several locals who were members of the District Council (with the exception of one, who was in the hospital). Tarr was present on behalf of the Union. At this meeting, the Association recognized the group of locals as bargaining representative, who indicated that they would recognize the Association if Jones would furnish a list of members. The locals gave Jones a copy of their contract which had been entered into by them with two associations of employers on June 4, 1962, which will be herein referred to as the area contract. Jones told the representatives present that he would give them a counteroffer at a later date.

A second meeting was held on August 14, 1962. This was attended only by Tarr, by representatives of Local 507 and 802 (although such representatives claimed to represent all the locals) and by Jones. Jones gave the locals' representatives a list of members of the Association along with the Association's counterproposals. These counterproposals were based on the area contract tendered by the locals, but they proposed certain deletions and changes, including deletion of the subcontractor clause, which the Association contended was unenforceable under Board rulings. It proposed changes in the area contract dealing with contractors' liability, and omitted provisions regarding a contractor's liability for default of subcontractors. It also proposed deletion of the entire article dealing with the subject of a cash bond required of each contractor which provision the Association alleged was illegal under a court ruling,[4] and the Association, in its counterpro-

[4]Citing (inaccurately) *Local 164 et al., Brotherhood of Painters, AFL-CIO v. N.L.R.B.*, 293 F. 2d 133, cert. den. 368 U.S. 824.

posal, said it would refuse to bargain on such a provision. The locals' representatives raised an objection that some members of the Association were members of another association whose members were already under contract with the locals. They rejected the Association's counter offer, reasserting a demand for a contract on terms contained in its area contract, and the three union representatives walked out of the room, refusing to negotiate with the Association. Following this meeting, Jones wrote a letter to the District Council and its locals, rejecting the re-offer of the aforesaid contract, and offering to continue negotiations.

No further meetings between the Union and the Association took place before October 19, 1962, when Lionel Richman, attorney for the District Council and its affiliated locals, wrote the following letter to Jones:

> This office represents the Southern California District Council of Laborers and its affiliated local unions. They have asked us to participate in the negotiations between the District Council and its local unions and the members of the Progressive Plastering and Lathing Contractors Association, whom you represent.
>
> At the outset, we wish to make it clear that the District Council is perfectly willing to negotiate with you on behalf of members of your association with whom we do not have an agreement. On the other hand, we are not willing to negotiate with you at this time on behalf of members of your association with whom we have existing agreements until such agreements expire.
>
> The following contractors, in our opinion, are bound by the agreement between the District

Council and the Contracting Plasterers Association, specifically, Arce-Tickey, Norris, Hudson, Case, and Saltoni. As far as we are concerned, we have valid, existing agreements with these contractors, agreements, by the way, which they are apparently violating. We understand they refuse to use the hiring hall and refuse to enforce the union security clause. We will expect you to advise your clients to abide by their agreements.

We also understand that you represent Franciscon, Ray, Boggs and Thompson. We will assume you represent no other plastering contractors, unless you give us specific advice as to the identity of other plastering contractors whom you claim to represent.

Now, with regard to those contractors whom you represent and with hom(sic) we do not have an agreement. We are prepared to negotiate. We understand that Mr. Boggs has indicated he would not sign an agreement containing a subcontract clause. We assume that is also your position of all of the members of your association.

As you know, our unions have worked for many years to get the subcontract clause in their agreements. In the construction industry employment is so irregular that it was necessary to negotiate the subcontract clause to try and preserve the work opportunities for our members. The subcontract clause had the effect of guaranteeing to the employees of signatory contractors a steadier pattern of employment.

Our members were willing to give up substantial immediate benefits in order to get the subcontract

clause, since they realized that in the long run it would probably repay them by providing more employment. At the same time, the employers were willing to give such a subcontract clause since it reduced their costs of doing business.

We are willing to withdraw our request for a subcontract clause but we will expect that in exchange our members will receive the immediate benefits that they gave up to get the subcontract clause.

Under the proposed Article I of the agreement, as it has been submitted, the employee could work knowing that he was protected insofar as his wages were concerned and insofar as his fringe benefits were concerned if a non-signatory contractor worked on a job as a subcontractor. That protection is now gone. We withdraw our request for the subcontract clause and ask that in lieu of the subcontract clause we receive what our members consider the value of the immediate benefits which they would require to make up for the long range benefits they lose by loss of the subcontract clause.

These are as follows:

1. Wage rates - $4.925 per hour;[5]
2. All time worked in excess of six consecutive hours or all time worked in excess of 36 hours per week and all time worked before 7:40 A.M. and after 4:10 P.M. to be paid at the double time rate. All work performed on Saturday, Sunday and holidays to be paid at three times the regular rate.

[5]The rate established by the Union's existing contract with other employer associations was $4.25 an hour.

3. Special Shift: When remodeling or alteration work cannot be performed during the regular day shift, Monday through Friday, because establishments cannot suspend operations during the day when the contractor may request, prior to starting the job, and the local union involved may permit the following special shift schedule:

   Plaster tenders so employed shall work for the double time rate, any work performed under the special shift clause from midnight Friday to 7:40 A.M. Monday would be paid at the triple time rate.

4. In the event of any dispute over the payment of wages to employees or payments of fringe benefits, the contractor agrees that he shall be liable for reasonable attorneys' fees and court costs incurred by the union or the employee in prosecuting such claims, whether through arbitration, litigation, judicial proceeding, or administrative proceeding.

I think that if you will consider what we are giving up [,] suggestion for additional benefits is very reasonable. Once again, we wish to emphasize that we no longer request a subcontract clause but request the above benefits in their place.

The negotiating committee would like to sit down with you and discuss the proposed contract. We would appreciate it if you could telephone this office so that we can arrange a mutually agreeable date.

As a result of this letter Jones met with Richman and a representative of the District Council at Richman's office on October 26, 1962. Jones told Richman that he felt that the proposal in Richman's letter was a "farce" to get around the subcontracting clause which he had disputed not only in this case but with other unions represented by Richman, as a subject for bargaining, and he said that his principals were not going to pay more than their competitors. Jones and Richman discussed the question of recognition. Richman said that, because five of the Association's members were already bound by another association's contract, he could not, on behalf of his clients, bargain with the Association, although he was willing to bargain with Jones for individual members of the Association who were not already under contract. The General Counsel does not take issue with this position. Regarding the bond, Richman said that his clients would, in a contract with the Association, modify the terms of the area contract but would not waive the bond as a subject of bargaining. The contract provision contained in the area contract demanded by the Union and its associates from the Associations' members (with appropriate changes of name) reads as follows:

ARTICLE X

BOND

A. A cash bond in the amount of One Thousand Dollars ($1,000) shall be deposited by the individual Contractor with the Joint Conference Board, or a trustee designated by the Joint Conference Board. Said bond shall be liable for any assessment for wages, vacation payments, liquidated damages as provided for in this Agreement,

and/or contributions for medical, hospital, welfare and life insurance plans, pension plan, and for employee benefits as provided for in this Agreement, as directed by the Joint Conference Board after hearing and vote as provided for in this Contract.

B. In lieu of the individual bond hereinabove provided, the Contracting Plasterers Association of Southern California, Inc. may furnish a cash bond in the amount of Twenty Thousand Dollars ($20,000) and the Orange County Lathing and Plastering Contractors Association, Inc. may furnish a cash bond in the amount of Ten Thousand Dollars ($10,000) each bond to be liable as hereinabove provided for any and all of their members respectively in good standing. Said Associations' bonds in the amount above set forth shall in no event be liable for ~~any~~ contractor member of either of said Associations covered by said bonds in excess of One Thousand Dollars ($1,000).

C. The Contracting Plasterers Association of Southern California, Inc. and any other association authorized hereunder to post a bond on behalf of its members with the Joint Conference Board shall provide a list of all of its members who are covered by said bond to each of the seven (7) Locals signatory hereto and to the Joint Conference Board. Any changes in membership, either by additions to or by withdrawals from, shall immediately be communicated to the seven (7) Locals and the Joint Conference Board.

D. The bond of the individual contractor and the bonds of the Contracting Plasterers Associa-

tion of Southern California, Inc. and the Orange County Lathing and Plastering Contractors Association, Inc. shall at all times be maintained in the full amount hereinabove set forth.

E. In addition to the bond herein required, the individual contractors shall file with the Union their social security and unemployment account numbers and certificate of compensation insurance.

F. The Joint Conference Board shall have the right to hear and determine and levy on all bonds in all matters concerning this Agreement in the manner provided for in Article XIII hereof.

G. The Joint Conference Board shall not be required to assess any bond for the payment of wages that are due and payable to an employee under the terms of this Contract for any period prior to twenty-one (21) days immediately preceding the submission of said claim for unpaid wages to the Joint Conference Board.

H. The terms and conditions of the bond as provided by this Article shall be as follows: Cash Bond. A cash bond shall be deposited with the Joint Conference Board or a trustee designated by the Joint Conference Board, said bond to be subject to any assessment for wages, vacation payments, liquidated damages as provided for in this Agreement, and medical, hospital, welfare and life insurance plans, pension plan, and for employee benefits as provided for in this Agreement, as directed by the Joint Conference Board after hearing and vote as provided for in this Agreement.

1. Said bond principal once deposited shall be refunded when this Agreement has been terminated,

or upon application to the Joint Conference Board after satisfactory proof that the Contractor is no longer contracting within the jurisdiction of any Local Union signatory hereto.

2. Upon application and satisfactory proof to the Joint Conference Board, the principal of the bond shall be refunded at the end of the yearly quarter.

3. No bond shall be required to be refunded sooner than sixty (60) days after application to the Joint Conference Board.

4. The Joint Conference Board or trustee designated by the Joint Conference Board shall have the authority to deposit all or any part of said funds so received in a savings or commercial bank account together with funds received from other Contractors or the Joint Conference Board, or trustee designated by the Joint Conference Board, shall have the authority to invest not more than seventy-five per cent (75%) of said funds together with funds received from other contractors in United States Government Bonds, certificates of deposits, insured savings and loan associations or such investments approved for trust funds.

5. The Joint Conference Board or the trustee, as the case may be, shall collect all income received by reason of interest or otherwise derived from the investment or deposit of said funds.

6. The income shall be deposited of as follows:

a. Payment of all expenses for administration of said fund.

b. Payment of taxes of all kinds.

c. Any balance of income shall be paid to the Pension Trust.

7. The depositing contractor of Association shall bear the tax assessments on capital gains on his proportion of said fund, if any, and shall also pay any other taxes levied on his proportionate share of said fund, if any.

8. A valuation of the principal fund shall be made quarterly to determine gain or loss affecting the contractor's deposit.

9. The trustee, if acting at the designation of the Joint Conference Board, shall disburse the principal or any portion thereof at the direction of the Joint Conference Board, and in order to pay any contractor's obligations as hereunder stated, said disbursements by the Joint Conference Board shall be made in the amounts and to the payee as directed.

10. The refund of the contractor's deposit upon direction of the Joint Conference Board shall be less any authorized principal disbursements, after which the balance would be revalued according to the profit or loss indicated by valuation of the principal fund.

11. All income, after payment of expenses, fees and taxes shall be distributed to the Pension Trust annually and at the termination of this Agreement. Said income be distributed to the Pension Trust even though by revaluation of the fund there has been determined to be a capital loss. That is to say, the income under no circumstances shall be used to reduce any capital losses or for the purpose

of paying any portion of disbursements for wages, welfare, or any levy directed by the Joint Conference Board.

Jones contended that the bond was not a mandatory subject of bargaining. Richman took the position that it was, inasmuch as it secured payment of employee wages or other benefits, although he apparently conceded that it would not be proper to demand a bond for full performance of all contract obligations. No differences were resolved at this meeting.

Two subsequent dates for meetings were set. On the first occasion, Jones, who had been out of town and whose plane had arrived an hour or so late, telephoned Richman from the airport. Richman, who had, in Jones absence, telephoned the latter's office to change the place of meeting from his own office to the District Council's office, where there was going to be a meeting of that council, replied that it was then too late, since some of the representatives had already left. Subsequently, a date was set for a meeting in late November, but Jones, because of illness in his family, had his secretary notify Richman that he would be unable to attend. Following the latter date, Richman filed a charge against the Association of refusal to bargain.

This charge was dismissed by the Regional Director on January 4, 1963. Meanwhile, however, on December 28, 1962, Jones and Richman met again. Richman said that he would bargain regarding individual contracts but that if Jones wanted an association contract he would discuss it. He said, however, that he could not consider an association contract which dif-

fered to any great extent from the area contract because of a provision in the latter, designated a "favored nations clause" which provided that the union signatories would not sign or work under any agreement with employers of plaster tenders in the area covered by that agreement giving more favorable terms or working rules than those established therein. This meant that the union had to insist on the subcontractor clause and the provisions for a bond. Jones objected to the fact that the Joint Conference Board (as trustees) would draw interest on a cash bond posted by individual employers, whereas, under an association contract, it was possible to post a blanket surety bond and he indicated that his principals might be amendable to a blanket bond. Jones proposed an $8,000 blanket bond but Richman asked $10,000 (which would conform with the blanket surety bond permitted to be posted by one of the two employer associations with whom the Union and other locals had a contract. The relative costs of surety bonds was discussed and was checked by Richman, but no final agreement thereon appears to have been reached. Jones and Richman also discussed the subcontractor clause to which the Association had expressed opposition. Richman said that he could not make a contract without the subcontractor clause because of the so-called favored nations clause in the other contract. He asked if this clause meant much to (meaning, I infer, whether it would often affect) members of the Association. Jones stated that the members of the Association were usually the subcontractors themselves. Richman said that he would sign a contract without a subcontractor clause if the employees were paid the higher wage rate as stated in his

letter of October 19, 1962. Jones again said that his people would not pay higher wages than their competitors. Richman told Jones that Tarr was going to put a picket on a job that Boggs was about to commence. The testimony is in dispute as to Jones' reply. Whatever his reply was, it has no bearing on the resolution of the issues here presented. The meeting concluded with the apparent understanding that Jones would check with the members of the Association to see if they would agree to the terms suggested by Richman. This was the last communication between Jones and Richman about bargaining so far as the evidence discloses.

2. Union's action to coerce Boggs

On about October 5, 1962, before Jones' first meeting with Richman, Tarr appeared at an apartment construction site in El Monte, California, where Boggs was the plastering contractor, and asked Boggs when he was going to sign "the agreement," referring to the area contract, copies of which had been delivered to Boggs in June 1962. Boggs asked, "What agreement?" Tarr said, "You know what agreement." Boggs replied that Jones was representing him and was supposed to sign for him. Tarr retorted: "B..... s..... . . . This could go on for a couple of years. Neither one of us is getting together. Are you going to sign this agreement or am I going to shut the job down?" Boggs said he thought "we was getting together," that "Jones and we are negotiating right now" and that he thought "we could sign through an association." Boggs asked time to telephone Jones and did so, but Jones was not in his office. Boggs left word for Jones to meet them at the jobsite. Tarr waited

about an hour longer and then left for lunch, but not before he had spoken with Boggs' employees, Wallace Rollman, James Warner, and Luther Burke. He told Rollman, who was a working foreman and a member of a sister local (Local 806, Pomona), and Warner separately that he (Tarr) was closing the job down because Boggs did not have an agreement, and he told Warner that Warner should go home and that he (Tarr) would return after lunch to see if Warner had left. In the presence of Rollman and Burke, Tarr said that if they did not leave the job they would be cited before the executive board. Burke commented that he did not know why the Union would send him out on Wednesday and make him leave the job on Friday, but he left the job at once. Warner and Rollman continued to work after lunch. Tarr returned and told Warner that he was "getting in deeper" by continuing to work.

On January 3, 1963, early in the morning, while Boggs was working on a plastering job in El Monte (not the same one as in October 1962), pickets were posted by the Union on this job with signs reading: "Elmer Boggs Unfair. No signed agreement. Local 1082." Tarr, who was present, told Warner, Boggs' employee, that he was setting up a picket line and that Warner was not to work, and that, if he worked, he would be cited before the executive board of the District Council. Warner did, however, continue to work.[6]

On the next morning, January 4, Tarr appeared at the same construction site and asked Boggs if he were going to sign the agreement. Boggs said that Jones

[6]Although Warner was later cited before the executive board and was fined, I do not rely on this fact in making any conclusions herein.

was representing him in negotiations and that he would like to know what was happening. Boggs, having telephoned Jones, was expecting Jones to come to the site of the picketing, and told Tarr that he would like to wait until Jones came. While they were waiting and discussing the contract, the general contractor, for whom Boggs was a subcontractor, arrived and from a distance observed the proceedings. Boggs said that the agreement which Tarr was attempting to get him to sign called for a cash bond and he asked if Tarr would take an assignment of a government bond. Tarr said he had never heard of anything like that. Boggs suggested an indemnity bond. Tarr said that he did not want an indemnity bond because it took too long to get the money. Finally Tarr said that if Boggs would give a certified check for $1,000, he would hold it (uncashed) until Jones and Richman got together and arranged a blanket bond. While they were waiting for Jones, Tarr told Boggs that he had spoken with the general contractor the night before and warned him that Boggs job would be picketed unless Boggs signed the agreement and that unless the general contractor got Boggs to sign the agreement he was going to picket his job, too. One of Boggs' suppliers arrived with a load of sand while they were there and Tarr sought to stop the driver from making delivery. When Jones had not arrived by 10:15 a.m., Boggs finally told Tarr that he would sign the agreement with the understanding that he could give a certified check for the bond and that the check would be held uncashed until a blanket bond was agreed on between Jones and Richman. After Boggs had signed the contract, Tarr took him to the general contractor and told the latter that

Boggs had promised to deliver a certified check by the following Tuesday (January 8) and that if he failed to do so, he (Tarr) was going to bring action against both of them. It does not appear what action he had in mind. Immediately following this, the picket line was removed.

As previously mentioned, a charge was filed against Respondents on Monday, January 7, 1963, based on the foregoing occurrences, including picketing to force or require Boggs to post a bond that was not a mandatory subject for collective bargaining. Boggs did not deliver the certified check on January 8. I deduce that Boggs did not intend to do so until coerced into doing so.

On Thursday, March 21, 1963, the Union again picketed one of Boggs' jobs in El Monte, and the picketing continued on Friday and the following Monday with a sign saying, "Violation of contract with Local 1082, Hod Carriers, El Monte." On Monday, March 25, 1963 Boggs talked with Tarr, meanwhile having given another union agent a certified check for the bond to be delivered to Tarr. Tarr told Boggs that he had five violations against Boggs, including failure to give the bond. Boggs told Tarr that he had given the check for the bond to the other agent. Another alleged violation was not having employee Warner cleared through the union hall. Regarding this, Boggs said that the Union would not accept Warner's dues and he did not expect that the Union would clear him. Tarr asked how Boggs would know whether or not the Union would give Warner a clearance. Boggs either had or thereafter remedied the other alleged violations. (It does not appear whether or not the Union thereafter insisted

on Warner's coming in to get a clearance.) Following this conversation, the picket line was removed.

3. Conclusions regarding refusal to bargain

(a) *Insisting on nonmandatory subjects of bargaining*

The Association, including Boggs, objected to both the subcontractor clause and the bond clause which the Union demanded as a condition to signing any contract with the Association. If these were not mandatory subjects of bargaining, the Union was refusing to bargain by insisting upon their inclusion as a condition to reaching an agreement.[7]

The clause commonly designated a subcontractor clause is understood to mean a clause which requires any signatory to the contract to insist that any subcontractor of his shall either sign the same agreement or agree that, with respect to his employees, the subcontractor will abide by all the provisions in the contract of which the subcontractor clause is a part, or both. The clause insisted upon by the Union in this case was no exception, but it also contained a provision that the "contractor shall not permit subcontracting by subcontractors without his knowledge and permission in writing." Under the construction industry exemption to Section 8(e) of the Act, a subcontractor clause may now be entered into and performed voluntarily, but a labor organization may not lawfully use economic action to compel an employer to agree to such a clause.[8]

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[7] *N.L.R.B. v. Wooster Division of Borg Warner*, 356 U.S. 342.

[8] *Construction, Production & Maintenance Laborers' Union Local 383 (Colson and Stevens Construction Co., Inc.)*, 137 NLRB 1650; *Building and Construction Trades Council, etc. (Gordon Fields)*, 139 NLRB No. 19; *Los Angeles Building &*

Since an employer may not be lawfully compelled to agree to such a provision, it follows that such a provision is not a mandatory subject of bargaining and that the Union, (1) by refusing to enter into an agreement with the Association without such a provision, and (2) by later picketing in order to compel Boggs to sign an agreement containing such clause refused to bargain within the meaning of Section 8(b)(3) of the Act.[9] Respondents take the position that the subcontractor clause was not a real issue between the parties. This contention is apparently based on the fact that Jones, at the meeting on December 28, 1962, conceded that members of the Association were usually subcontractors and did not themselves do much subcontracting. There is no evidence, however, that Jones agreed to include such provision in an agreement, and, even though the clause would have little value to the Union when dealing with an Association whose members did little or no subcontracting, the Union had, by virtue of the "favored nation's" clause in its contract with other employer associations, foreclosed itself from entering into any agreement not containing a subcontractor clause. On this state of the evidence, I find that the Association did not make a voluntary agreement to include the subcontractor clause in the agreement being negotiated. Further, Boggs' contract, signed separately under coercion while being picketed, can scarcely be called a voluntary agreement. Even if Boggs did not argue

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Construction Trades Council (Cecil Mays), 140 NLRB No. 124; *Building and Construction Trades Council of Orange County, AFL-CIO (Sullivan Electric Company)*, 140 NLRB No. 82; *Orange Belt District Council of Painters No. 48 (Calhoun Dry Wall)*, 139 NLRB No. 32.

[9]See *N.L.R.B. v. International Brotherhood of Electrical Workers*, 266 F. 2d 349 (C.A. 5).

with Tarr about the subcontractor clause, he did argue that the agreement should be handled by Jones, an argument that Respondents were bound to accede to. The fact that Boggs might have agreed to be bound by a subcontractor clause if Jones had approved it does not alter the case and make Boggs' acceptance of the subcontractor clause a voluntary one.

It has long been settled that an employer who conditions agreement in collective bargaining upon the giving of a performance bond by the employees' collective bargaining agent violates Section 8(a)(5) of the Act.[10] Similarly, it has been held that a union which insists upon a performance bond from an employer is refusing to bargain.[11] Although they do not argue the point in their brief, Respondents had, in negotiations, taken the position that a bond to secure payment of wages and other benefits to employees is distinguishable from a performance bond of the kind held to be a nonmandatory subject of bargaining in the *Cheatham* case cited above.[12] The law is now well settled regarding performance bonds as a nonmandatory subject of bargaining, but, so far as I know, the Board has never passed on a cash bond like the one demanded by the Union in this case. In the cases which have held provisions for performance bonds to the nonmandatory subjects of bargaining, the ground usually stated is that it does not relate to wages, hours, and other terms

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[10] *Jasper Blackburn Products Corporation*, 21 NLRB 1240, at 1254; *Taormina Company*, 94 NLRB 84.

[11] *International Brotherhood of Teamsters, etc. (Conway's Express)*, 87 NLRB 972 at 978-9; *Local 164, et al., Brotherhood of Painters (Cheatham Painting Co.)*, 126 NLRB 997, enf'd 293 F. 2d 133 (C.A. D.C.), cert. den. 368 U.S. 824.

[12] The bond in that case was not stated to be a surety bond, but it was to have been forfeited and paid to the union in the event of any substantial breach of contract.

and conditions of employment, which are mandatory subjects of bargaining. Although it has not been mentioned, I should conceive a surety bond to be nonmandatory also because it would be an attempt to add a stranger to the bargaining process, just as where an employer refuses to enter into an agreement with a certified bargaining representative unless its parent organization also should become a party to the agreement.[13] However, it has been held that any bond or indemnity clause to cover damages for breach of contract is a nonmandatory subject of bargaining. Hence, with or without surety, it is a nonmandatory subject of bargaining.[14] In negotiations with Jones, Richman sought to differentiate the clause in the proposed contract from performance bonds generally by asserting that the Union's proposed cash bond was related to wages and other employee benefits. Perhaps Richman was looking at the cash bond as a kind of substituted or alternative primary performance rather than as a remedial device to substitute for court action. It has been suggested that such a provision to assure payment of employee benefits might, if there were a history of delinquency, be argued to be a mandatory subject of bargaining.[15] Of course, trust funds to ensure payment of health and accident claims and of pensions are recognized as mandatory subjects of bargaining. In the case at hand, the Union might argue that its "cash bond" to ensure wages and other benefits to employees merely went into a trust fund and therefore should equally be a mandatory subject of bargaining.

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[13]See *Cosco Products Company,* 123 NLRB 766; *North Carolina Furniture, Inc.,* 121 NLRB 41.

[14]See *Cosco Products Company,* 123 NLRB 766 and cases there cited.

[15]51 LRRM 99.

Whether or not this argument would meet with approval standing by itself, it lacks merit here because of other provisions in the proffered contract. The contract was expected by Respondents to be taken as a package by the Association and each of its members, including Boggs; and some of the other provisions in that contract bring the cash bond more clearly into the realm of a nonmandatory subject of bargaining. The language of the contract is vague (perhaps intentionally so) as to whose employees would be entitled to benefit from the cash bond. So far as the language of the contract goes, the cash bond of an employer signatory to the contract might be assessable for wages of a subcontractor's employees in the event that the contractor had not required the subcontractor to become bound by the contract or if the subcontractor had not himself posted his cash bond. It was Richman's opinion that the cash bond of the signing employer would be so assessable. The Joint Conference Board under the terms of the contract demanded by the Union, is empowered to impose "lawful penalties" against a contractor "for violation of this Agreement." If a signing employer should, contrary to the subcontractor clause, subcontractor with a nonsigning subcontractor and if the latter should not pay the wages required by the contract, the Joint Conference Board might decide that the signing contractor should, as a penalty, pay those wages. Nowhere in the bond clause is the liability of a contractor specifically stated to be limited to wages of his own employees. The language of the contract is general: "Said bond shall be liable for any assessment for wages [not limited to specific employees] . . . as provided in this agreement, as directed by the Joint Conference Board after hearing and vote as provided in this

Contract." Also, one provision in the contract is for liquidated damages for failure to perform a required act, and the bond is liable for such liquidated damages. The Board has consistently viewed contract proposals not limited to wages, hours, or other terms or conditions of performance as nonmandatory subjects of bargaining.[16] So a contract which includes an obligation to pay wages of another employer's employees or to pay damages for nonperformance of an employer's obligation, it would follow, would be a nonmandatory subject of bargaining.[17]

I conclude and find, therefore, that by conditioning the making of a contract depend on the Association's or Boggs' agreeing to the subcontractor clause and to the provision for a cash bond, the Union has refused to bargain within the meaning of Section 8(b)(3) of the Act.

(b) *Refusal to bargain by Respondents' take-it-or-leave-it attitude*

The General Counsel argues that the Union, as early as the second bargaining session (August 14, 1962), indicated an intent not to bargain when one of the

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[16]See *Arlington Asphalt Co.*, 136 NLRB 742, enf'd .... F. 2d .... (C.A. 4), 53 LRRM 2462; *N.L.R.B. v. Wooster Division of Borg Warner Corporation*, 356 U.S. 342; *Detroit Resilient Floor Decorators Local Union No. 2265*, 136 NLRB 769; *Metropolitan District Council of Philadelphia*, 137 NLRB 1583.

[17]*Local 164, Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO (A. D. Cheatham Painting Company)*, 126 NLRB 997, enf'd 293 F. 2d 133 (C.A. D.C.), cert. den. 368 U.S. 824; *Cosco Products Company*, 123 NLRB 766; *International Brotherhood of Teamsters, etc. (Conway's Express)*, 87 NLRB 972; *Scripto Manufacturing Company*, 36 NLRB 411; *Jasper Blackburn Products Corporation*, 21 NLRB 1240; *Taormina Company*, 94 NLRB 884; also cases cited, *supra*, footnote 16.

spokesmen for the Union told Jones that the unions would sign no agreement but the "standard area agreement." In view of the "favored nations clause" in that agreement, I conclude that the Union's spokesman was not just putting on an initial appearance of hard bargaining and that the Union and its contracting locals had no choice but to require the same terms and conditions from the Association. Under the Act, this favored-nations clause is no defense to a charge of refusal to bargain. Although phrased with more tact than had been exhibited by the Union's representatives on August 14, 1962, Richman's statement in his negotiations with Jones that he could not deviate to any material degree from the terms of the existing contract defined his ability to discuss terms. He too was fettered by the same favored-nations clause. This left no room for bargaining. Although he might have made minor changes in wording, he could not give different terms. The offer in his letter to give up the subcontractor clause if the Association members agreed to pay exorbitant wage demands can be looked upon only as a tactic to give an appearance of bargaining knowing that the offer could not be accepted. It does not convince me as being a good faith offer. The existing contract was, therefore, offered to the Association as a contract of adherence like the contract offered by an insurance company to an applicant for insurance which the individual applicant cannot vary by bargaining. Tarr indicated as much in attempting to force Boggs' signing. The evidence is convincing that the Union never had an intent to negotiate a contract different from the area contract. It was committed from the outset to bringing Boggs and other members of the Association into compliance with that contract.

By entering into negotiations with the Association with a fixed determination not to bargain and with a padlock on its choice of terms and conditions, the Union refused to bargain in good faith with the Association, thereby violating Section 8(b)(3) of the Act.

(c) *Restraint and coercion in selection of bargaining representative; use of divisive tactics*

Before any impasse had arisen and after a flat statement by the Union's representatives of refusal to bargain, the Union began to take coercive steps against Boggs. On October 5, 1962, Tarr appeared at the site of one of Boggs' jobs and sought to coerce Boggs into foregoing bargaining negotiations through the Association and to sign the so-called area contract, implementing his conduct by telling Boggs' employees to leave the job, and succeeding in getting one to leave.

On January 3, 1963, Tarr again sought to compel Boggs to sign the area contract and forego representation by the Association by putting a picket-line on Boggs' job. This was at a time when there was no impasse in bargaining and when, in fact, there appeared to be possibility of an agreement. Although Boggs did not withdraw from the Association, he did, in order to get rid of the picket line, sign the area contract. Tarr, at that time, expressed his opinion of collective bargaining as futile, because it would not make the Association accept the area contract. My conclusion that the Union, by Tarr's conduct, violated Section 8(b)(1)(B) and 8(b)(3) of the Act is not altered by the fact that Tarr waited for a period of about an hour for Jones to appear at the jobsite. Tarr had no legal right to approach Boggs separately about con-

tract terms so long as no impasse had occurred.[18] But such improper conduct of Tarr, the Union was disregarding its duty to bargain with Boggs' designated bargaining agent. Boggs, at that time, was the only member of the Association who was picketed. Plainly, the Union cannot reasonably argue that an impasse had been reached. Richman himself was of the impression that the agreement on the amount of a blanket bond was the only real issue between the parties, and that is no showing that this was an insurmountable obstacle. There is no evidence that the Association was standing firm. Indeed, as nearly as I can determine from the evidence, Jones did not flatly reject the Union's latest offer but was going to explore the subject with the Association's committee. But even if Jones had not indicated as much, I should find no impasse here. As stated by the Board in *The Westchester County Executive Committee*, 142 NLRB No. 14, "An impasse should not be mechanically inferred simply because the parties have failed to reach complete agreement after some specified number of negotiating sessions or whenever one party announces that his position is henceforth fixed and no further concessions can be expected." And it must also be borne in mind that even if an impasse had been reached here, it would be mainly because the Union had made it impossible for itself to vary the terms of the area contract by virtue of the favored-nations clause and because of its insistence on nonmandatory subjects of bargaining.

On all the evidence, I conclude and find that, by picketing Boggs in order to coerce him into abandoning

[18] *The Westchester County Executive Committee*, 142 NLRB No. 14.

negotiations through his chosen representative and to coerce him into entering into a separate contract, the Union has violated Section 8(b)(3) and 8(b)(1)(B) of the Act.[19].

(d) *Violations of Section 8(b)(4)(i)(ii)(A) and (B)*

In view of the numerous decisions holding that coercion to obtain a contract authorized by Section 8(e) is a violation of the Act,[20] the Respondents have no reasonable defense to the allegations of the complaint under Section 8(b)(4)(ii)(A) of the Act. There is no evidence that the Association had accepted the subcontractor clause voluntarily. Even if Jones had intimated that the subcontractor clause would seldom affect the members of the Association and that, for this reason, it was not a major stumbling block, the Respondents did not even wait to see whether or not the Association would assent to it. I find no evidence that Jones even suggested that the objection to this clause might be waived if the parties came to agreement in the Union's demand for a cash bond, nor do I find any evidence that Boggs would have assented to such a clause in the absence of picketing. By Tarr's conduct in placing pickets on Boggs' job on January 3 and 4, 1963, there-

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[19]*The Westchester County Executive Committee,* 142 NLRB No. 14; *General Teamsters Local Union No. 324 (Cascade Employers Association, Inc.),* 127 NLRB 488.

[20]*The Essex County and Vicinity District Council of Carpenters and Millwrights, etc.,* 141 NLRB No. 80; *Hoisting and Portable Engineers Local Union 101,* 140 NLRB No. 123; *Building and Construction Trades Council of Orange County, AFL-CIO,* 140 NLRB No. 82; *Local Union 825, International Union of Operating Engineers, AFL-CIO,* 140 NLRB No. 48; *Building and Construction Trades Council of San Bernardino and Riverside Counties,* 139 NLRB No. 19.

by forcing Boggs to sign a contract containing the aforesaid subcontractor clause, the Respondents have engaged in unfair labor practices in violation of Section 8(b)(4)(ii)(A) of the Act, and by the same conduct the Respondents have engaged in unfair labor practices in violation of Section 8(b)(4)(ii)(B) of the Act.[21] By Tarr's conduct on behalf of the Union, designed to induce employees to withhold their services from Boggs, as described above,[22] with an object of forcing Boggs to sign a subcontractor clause described above, the Union has engaged in unfair labor practices within the meaning of Section 8(b)(4)(i)(A) and (B).[23]

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[21] *Orange Belt District Council of Painters No. 48, AFL-CIO,* 139 NLRB No. 32, and cases cited *supra,* footnote 20.

[22] I include in this finding Tarr's directions to Boggs' employees on October 5, 1962, to stop working, his direction to an employee of one of Boggs' suppliers to desist from delivering sand to Boggs, and his establishment of a picket line on January 3, 1963, as well as statements to Boggs' employees in January 1963 designed to interrupt their services. Although Tarr was successful in getting only Burke to quit working, in October, success is not an element of "inducement" as that word is used in the Act. *The Essex County and Vicinity District Council, etc.,* 141 NLRB No. 80. The General Counsel argues that Tarr's inducement of Boggs' foreman, Rollman, is to be included because Rollman is an "individual" within the meaning of Section 8(b)(4)(i) of the Act, citing *Carolina Lumber Company,* 130 NLRB 1438. Although I agree that Rollman is to be included, I find it unnecessary to decide the nature of Boggs' supervisory status inasmuch as the Circuit Court has disagreed with the distinctions made by the Board in the case cited by the General Counsel regarding types of supervisors and includes all kinds of supervisors. *Servette, Inc. v. N.L.R.B.,* 310 F. 2d 659 (C.A. 9).

[23] *Los Angeles Building & Construction Trades Council (Interstate Employers, Inc.),* 140 NLRB No. 124; *Orange Belt District Council of Painters No. 48, AFL-CIO,* 139 NLRB No. 32; *Construction, Production & Maintenance Laborers Union Local 383, AFL-CIO (Colson and Stevens Construction Company),* 137 NLRB No. 149; *Building and Construction Trades Council of Orange County, AFL-CIO,* 140 NLRB No. 82; *Hoisting and Portable Engineers Local Union 101,* 140 NLRB No. 123; *The Essex County and Vicinity District Council of Carpenters and Millwrights, etc.,* 141 NLRB No. 80.

Although Tarr was named as a party respondent to the case, the complaint describes the aforesaid conduct of Tarr on behalf of the Union only as that of an agent and does not, in its conclusionary paragraphs (paragraphs 15, 17, 18, 19), allege that Tarr, individually, committed the unfair labor practices charged to the Union. For this reason, I make no finding that Tarr, himself, violated the Act.

IV. The effect of the unfair labor practices upon commerce

The activities of the Respondents, set forth in Section III, above, occurring in connection with the operations of Boggs, described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. The remedy

I have found herein that the Union has engaged in unfair labor practices within the meaning of Section 8(b) subsections (1)(B), (3) and (4)(i)(ii)(A) and (B). I shall therefore recommend an order that the Union cease and desist from the conduct herein found to be violative of the Act, and I shall recommend the usual appropriate affirmative action designed to effectuate the policies of the Act.

Because the contract which Boggs signed was procured under duress, I shall recommend that the Union cease and desist from giving effect to such contract. Although the evidence indicates that the principal objections that Boggs had to this contract involved the

subjects which were not mandatory subjects of bargaining, the evidence is not clear that any voluntary agreement was finally reached on the remaining subjects. Therefore, I shall not exclude the remainder of the contract from this recommendation.

The General Counsel urges, as part of the remedy, that the cash bond be returned to Boggs, and the Charging Party requests a remedy that, in addition to a return of the bond, "the Respondent" pay interest on the sum for the time it was retained. The Respondents, on the other hand, protest that an order for return of the bond is inappropriate because of the fact that the agreement signed by Boggs was a joint one with a number of unions (members of same district council) and that the bond was for the benefit of all the parties, and that therefore no order refunding the cash bond could run against the Union alone nor against all the locals without joining the other locals as parties respondent. The evidence, however, discloses that Boggs gave a certified check to Tarr upon Tarr's promise not to cash the check until Jones and Richman had agreed upon a blanket bond for the Association. There is no evidence that the Association, Boggs' bargaining agent, and the Union or any of the other unions of the District Council ever reached an agreement on a blanket bond. Presumably, therefore, either Tarr or an officer of the Union still holds Boggs' certified check intact. Thus being the case, I find no difficulty in framing a remedy requiring that the check be returned to Boggs. The theory upon which interest is given in Board orders, such as orders for backpay, is that the employer has had the use of monies which rightfully belonged to employees. In the case at hand, since the

certified check which Boggs gave to Tarr was to be held uncashed, it is obvious that the Union did not have the use of the funds for the purpose of investing it and getting interest thereon. Under the circumstances of this case, therefore, I believe it would not be appropriate to require the Union to pay interest on the cash bond which still remained (by agreement) in the form of a certified check, and I shall not so recommend. Even if the Union wrongfully cashed the check and turned the proceeds into the joint fund, the responsibility of refunding the $1000 to Boggs will be the Union's alone, for Tarr was acting (unlawfully) only for the Union in procuirng the so-called cash bond from Boggs. It is unnecessary, for the purposes of this case, to look to the source from which the Union procures the $1000 to make restitution to Boggs.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, I make the following:

Conclusions of Law

1. Boggs is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Boggs is a person, engaged in commerce or in an industry affecting commerce, within the meaning of Section 8(b)(4)(i)(ii) of the Act.

3. All of Boggs' plaster tenders working in the geographical area of Los Angeles County, Orange County, Catalina Island, and the following offshore islands if the point of embarkation is from Los Angeles or Orange counties, namely: Richardson Rock, Santa Cruz Island, Arch Rock, San Nicholas Island, San Clemente Island, San Miguel Island, Santa Rosa

Island, Anacapa Island (Channel Islands Monument), and Santa Barbara Island, excluding executives, civil engineers and their helpers, superintendents, assistant superintendents, master mechanics, timekeepers, messenger boys, office workers or any employees of the contractor above the rank of craft foreman and supervisors as defined in the Act, constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material herein, Respondent Union has represented, and presently does represent, a majority of the employees in the unit described above and has been, and presently is, the exclusive representative of all employees in said unit for purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment by virtue of Section 9(a) of the Act.

5. George Tarr at all times material herein, has been and still is a business representative of the Union and is an agent of the Union, within the meaning of Section 2(13) of the Act, acting on its behalf.

6. By forcing Boggs to enter into an individual contract, not negotiated for him by his designated representative, the Association, the Union has engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(B) of the Act.

7. By the conduct stated in paragraph 6 above and by refusing to enter into or to negotiate any contract which did not contain nonmandatory subjects of bargaining, to wit, a subcontractor clause and a bond as security for the performance of the agreement, the Union has engaged in and is engaging in unfair labor

practices within the meaning of Section 8(b)(3) of the Act.

8. By insisting that Boggs accept a package contract on a take-it-or-leave-it basis, the Union has gaged in unfair labor practices within the meaning of Section 8(b)(3) of the Act.

9. By picketing Boggs and by inducing or encouraging individuals employed by Boggs to refuse, in the course of their employment, to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, and by threatening, coercing, and restraining Boggs, where, in each event, an object thereof was forcing Boggs to enter into an agreement wich is prohibited by Section 8(e) and forcing Boggs to cease doing business with any other subcontractor who had not signed the Union's area agreement, the Union has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(4)(i)(ii)(A) and (B) of the Act.

10. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, I recommend that the Respondent, International Hod Carriers, Building and Common Laborers Union of America, Local #1082, its officers, representatives, and agents, including George Tarr, shall:

1. Cease and desist from:

(a) In any manner restraining or coercing Boggs in his selection of Progressive Plastering and Lathing

Contractors' Association, or any other person, group, corporation, organization, or association as his representative for the purposes of collective bargaining.

(b) Refusing to bargain with Boggs by insisting upon the inclusion in a contract of nonmandatory subjects of collective bargaining as a condition to the execution of a collective bargaining agreement, or by insisting upon acceptance by Boggs of a package contract without negotiation of the terms thereof with Boggs or his collective bargaining representative, or by bypassing Boggs' chosen collective bargaining representative and attempting to deal directly with Boggs, or in any other manner refusing to bargain with Boggs concerning wages, hours, or other terms or conditions of employment of his employees.

(c) Maintaining, giving effect to, or enforcing the contract which Boggs was coerced into signing on January 4, 1963, or giving effect to or enforcing any term or condition thereof unless and until such term or condition has been embodied in a signed agreement entered into by Boggs voluntarily.

(d) Engaging in, or inducing or encouraging any individual employed by any person engaged in commerce or in an industry affecting commerce within the meaning of the Act, to engage in a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, or threatening, coercing, or restraining any person engaged in commerce or in an industry affecting commerce within the meaning of the Act, where in either case an object thereof is forcing or requiring Boggs to enter into any agreement which is prohibited

by Section 8(e) of the Act, or forcing or requiring Boggs to cease doing business with any other person.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Return, or cause to be returned, to Boggs the certified check for one thousand dollars which was delivered by Boggs and received by Tarr on behalf of the Union as a cash bond, which check was procured under duress, and, if said check was cashed, then refund the one thousand dollars to Boggs.

(b) Upon request, bargain collectively with Boggs, through his chosen representative, with respect to wages, hours, and other terms and conditions of employment of employees in the unit found to be appropriate for bargaining purposes, and, if agreement is reached, embody the terms thereof in a signed contract.

(c) Post in conspicuous places at the Union's business offices, meeting halls, and all places where notices to members are customarily posted, copies of the notice attached hereto as an appendix.[24] Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region, shall, after having been duly signed by an authorized representative of the Union, be posted by the Union immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive

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[24]In the event that these Recommenations be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

days thereafter. Reasonable steps shall be taken to assure that the notices are not altered, defaced, or covered by any other material.

(d) Sign and deliver sufficient copies of said notice to the Regional Director for the Twenty-first Region, for posting by Boggs, Boggs being willing, at all locations where notices to his employees are customarily posted.

(e) Notify the Regional Director for the Twenty-first Region, in writing, within 20 days from the date of service of this Intermediate Report and Recommended Order, of what steps the Union has taken to comply herewith.[25]

It is further recommended that, unless within 20 days from the date of receipt of this Intermediate Report and Recommended Order, the Respondent Union shall have notified the said Regional Director, in writing, that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring said Respondent to take the action aforesaid.

Dated: Aug. 27, 1963.

James R. Hemingway
Trial Examiner

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[25]In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director in writing within 10 days from the date of this Order of what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL OUR MEMBERS AND TO ALL EMPLOYEES OF E. L. BOGGS PLASTERING COMPANY PURSUANT TO THE RECOMMENDED ORDER OF A TRIAL EXAMINER

of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby give notice that:

WE WILL NOT in any manner restrain or coerce E. L. BOGGS, doing business as E. L. BOGGS PLASTERING COMPANY, in the selection of PROGRESSIVE PLASTERING & LATHING CONTRACTORS' ASSOCIATION or of any other person, group, corporation, organization, or association as his representative for the purposes of collective bargaining.

WE WILL NOT refuse to bargain with said Boggs by insisting upon the inclusion in a contract of nonmandatory subjects of bargaining as a condition to the execution of a collective bargaining agreement, by insisting upon acceptance by Boggs of a package contract without negotiation of the terms thereof with Boggs' collective bargaining representative, or by bypassing Boggs' selected collective bargaining representative and attempting to deal directly with Boggs, or in any other manner refusing to bargain with Boggs concerning wages, hours, or other terms or conditions of employment of his employees.

WE WILL NOT engage in, or induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in a strike or a refusal in the course of his employment, to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services and we will not threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where, in either case, an object thereof is forcing or requiring Boggs to enter into an agreement which is prohibited by Section 8(e) of the Act or forcing or requiring Boggs to cease doing business with any other person.

WE WILL return or cause to be returned the certified check for one thousand dollars ($1,000) which was delivered by said Boggs and received by George Tarr on behalf of this labor organization as a cash bond or we will refund the proceeds of said check.

WE WILL upon request, bargain collectively with said Boggs, through his chosen representative, with respect to wages, hours, and other terms and conditions of employment of employees in the unit found to be appropriate for bargaining purposes and, if an agreement is reached, we will embody it in a signed contract. The bargaining unit is:

All of Boggs' plaster tenders working in the geographical area of Los Angeles County, Orange County, Catalina Island, and the following offshore islands if the point of embarka-

tion is from Los Angeles or Orange County, namely, Richardson Rock, Santa Cruz Island, Arch Rock, San Nicholas Island, San Clemente Island, San Miguel Island, Santa Rosa Island, Anacapa Island (Channel Islands Monument), and Santa Barbara Island, excluding executives, civil engineers and their helpers, superintendents, assistant superintendents, master mechanics, timekeepers, messenger boys, office workers, or any employees of the contractor above the rank of craft foreman and supervisors as defined by the Act.

INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICAL, LOCAL No. 1082

(Labor Organization)

Dated ..... By .....
(Representative) (Title)

Dated ..... By .....
George Tarr, Business Representative

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 849 South Broadway, Los Angeles, California 90014 (Telephone No: 688-5204), if they have any questions concerning this notice or compliance with its provisions.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

National Labor Relations Board, Petitioner, vs. International Hod Carriers, Building and Common Laborers Union of America, Local No. 1082 and its agent, George Tarr, Respondents. No. 20,775.

[September 29, 1967]

Petitioner to enforce an order of the National Labor Relations Board.

Before: Chambers, Browning, and Ely, Circuit Judges

Per Curiam:

The Board held that the respondent union violated its duty to "confer in good faith and with respect to wages, hours, and other conditions of employment * * *" imposed by section 8(b)(3) and 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(b)(3) and (d) when it refused to enter into a collective bargaining agreement unless that agreement contained a provision requiring the employer to post a performance bond.

The respondent first contends that the evidence does not support the Board's finding that the respondent insisted upon the posting of a performance bond. We think that the record considered as a whole contains substantial evidence to support the Board's finding. See *Universal Camera Corp. v. NLRB,* 340 U.S. 474 (1941).

The respondent next contends that the Board erred in concluding that bargaining for the performance bond clause did not constitute bargaining "with respect to

wages, hours, and other conditions of employment" within the meaning of section 8(d). See *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958).

The Board has uniformly held that bargaining for a performance bond does not fall within the meaning of section 8(d), and that, therefore, the parties may not insist upon such a bond to impasse. These orders have uniformly been enforced, despite challenge. The cases are collected in *NLRB v. American Compress Warehouse,* 350 F.2d 365, 370 n.7 (5th Cir. 1965), and *NLRB v. Davison,* 318 F.2d 550, 555 n.14 (4th Cir. 1963). The basic reason for these rulings was expressed in *Excello Dry Wall Co.,* 145 N.L.R.B. 663, 664 (1963): "The statutory obligation to bargain is not limited and cannot be limited to financially responsible parties, whether employer or labor union."

In the present case the Board did not hold all performance bond clauses to be nonmandatory subjects of bargaining. Respondent had argued to the trial examiner that the performance bond it had sought was different from those involved in the Board's earlier decisions because it was to be a cash bond (rather than a surety bond), and because it was to be conditioned solely upon payment by each employer of the wages and other benefits due its employees. The trial examiner expressly reserved the question of whether such a performance bond clause would have been a mandatory subject of bargaining. He pointed out that the clause involved in this case would have required the contracting employer to pay liquidated damages and to guarantee payment of wages and fringe benefits due the employees of subcontractors of the contracting employer. The trial examiner held: "a contract which

includes an obligation to pay wages of another employer's employes or to pay damages for nonperformance of an employer's obligation * * * would be a nonmandatory subject of bargaining." *International Hod Carriers, Local 1082,* 150 N.L.R.B. 158, 178 (1964). The Board adopted his conclusion.

"Ovviously, classification of bargaining subjects as 'terms or conditions of employment' is a matter concerning which the Board has special expertise." *Meat Cutters v. Jewel Tea,* 381 U.S. 676, 685-86 (1965) (opinion of Justice White). We are not convinced that the Board erred in the exercise of that expertise here.

The order of the Board will be enforced.

ELY, Circuit Judge, dissenting:

I respectfully dissent. I expressed my views in a proposed opinion in which my Brothers, after very careful and conscientious consideration, refused to concur. It appears below.[1]

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[1]The National Labor Relations Board petitions for enforcement of an order which directs the Respondent union to cease and desist from engaging in conduct found to constitute an unfair labor practice and to take certain affirmative action. Our jurisdiction is supplied by section 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e). The decision of the Board is reported at 150 N.L.R.B. 158 (1964).

For two years prior to May 31, 1962, E. L. Boggs, a plastering contractor, had been party to an agreement with one of the respondent's sister locals. When that agreement expired, Boggs joined the Progressive Plastering & Lathing Contractors' Association, an organization which was formed to provide collective bargaining representation for its members. In June, 1962, a representative of the respondent union appeared at Boggs' jobsite and delivered a copy of a proposed contract to Boggs' foreman. The foreman delivered the contract to Boggs, in compliance with the union representative's instructions, but Boggs refused to sign it. Shortly thereafter, the Association, acting for Boggs and its

other members, entered into negotiations for a new contract with the Southern California District Council of Laborers, of which respondent was a member. No agreement was reached. The reason for the failure of these negotiations, and the reason for Boggs' unwillingness to sign the contract which had been offered to him earlier, was the union's insistence that it would not agree to a contract which did not contain a provision for a performance bond. During the period of the negotiations between the Association and the District Council, one Tarr, the respondent local's business representative, approached Boggs and, attempting to persuade him to sign a contract containing a performance bond clause,[1] threat-

[1]The provision, in its entirety, reads:

ARTICLE X

BOND

A. A cash bond in the amount of One Thousand Dollars ($1,000) shall be deposited by the individual Contractor with the Joint Conference Board, or a trustee designated by the Joint Conference Board. Said bond shall be liable for any assessment for wages, vacation payments, liquidated damages as provided for in this Agreement, and/or contributions for medical, hospital welfare and life insurance plans, pension plan, and for employee benefits as provided for in this Agreement, as directed by the Joint Conference Board after hearing and vote as provided for in this Contract.

B. In lieu of the individual bond hereinabove provided, the Contracting Plasterers Association of Southern California, Inc. may furnish a cash bond in the amount of Twenty Thousand Dollars ($20,000) and the Orange County Lathing and Plastering Contractors Association, Inc. may furnish a cash bond in the amount of Ten Thousand Dollars ($10,000) each bond to be liable as hereinabove provided for any and all of their members respectively in good standing. Said Associations' bonds in the amount above set forth shall in no event be liable for any contractor member of either of said Associations covered by said bonds in excess of One Thousand Dollars ($1,000).

C. The Contracting Plasterers Association of Southern California, Inc. and any other association authorized hereunder to post a bond on behalf of its members with the Joint Conference Board shall provide a list of all of its members who are covered by said bond to each of the seven (7) Locals signatory hereto and to the Joint Conference Board. Any changes in membership, either by additions to or by withdrawals from, shall immediately be communicated to the seven (7) Locals and the Joint Conference Board.

D. The Bond of the individual contractor and the bonds of the Contracting Plasterers Association of Southern California, Inc.

(This footnote is continued on the next page)

and the Orange County Lathing and Plastering Contractors Association, Inc. shall at all times be maintained in the full amount hereinabove set forth.

E. In addition to the bond herein required, the individual contractors shall file with the Union their social security and unemployment account numbers and certificate of compensation insurance.

F. The Joint Conference Board shall have the right to hear and determine and levy on all bonds in all matters concerning this Agreement in the manner provided for in Article XIII hereof.

G. The Joint Conference Board shall not be required to assess any bond for the payment of wages that are due and payable to an employee under the terms of this Contract for any period prior to twenty-one (21) days immediately preceding the submission of said claim for unpaid wages to the Joint Conference Board.

H. The terms and conditions of the bond as provided by this Article shall be as follows: Cash Bond. A cash bond shall be deposited with the Joint Conference Board or a trustee designated by the Joint Conference Board, said bond to be subject to any assessment for wages, vacation payments, liquidated damages as provided for in this Agreement, and medical, hospital, welfare and life insurance plans, pension plan, and for employee benefits as provided for in this Agreement, as directed by the Joint Conference Board after hearing and vote as provided for in this Agreement.

1. Said bond principal once deposited shall be refunded when this Agreement has been terminated, or upon application to the Joint Conference Board after satisfactory proof that the Contractor is no longer contracting within the jurisdiction of any Local Union signatory hereto.

2. Upon application and satisfactory proof to the Joint Conference Board, the principal of the bond shall be refunded at the end of the yearly quarter.

3. No bond shall be required to be refunded sooner than sixty (60) days after application to the Joint Conference Board.

4. The Joint Conference Board or trustee designated by the Joint Conference Board shall have the authority to deposit all or any part of said funds so received in a savings or commercial bank account together with funds received from other Contractors or the Joint Conference Board, or trustee designated by the Joint Conference Board, shall have the authority to invest not more than seventy-five per cent (75%) of said funds together with funds received from other contractors in United States Government Bonds, certificates of deposits, insured savings and loan associations or such investments approved for trust funds.

ened a work stoppage. When Boggs persisted in his refusal, Tarr carried out the threat and set up a picket line around the jobsite. Boggs then agreed to sign the contract upon the understanding that he might give a certified check to satisfy the bond provision and that the check would be held, uncashed, pending an agreement between the Association and the District Council for a blanket bond covering all the Association's members. After Boggs signed the contract and delivered the check, the picket line was removed.

The Board held that the respondent's insistence upon a performance bond clause, as evidenced by its position at the bargaining table and by its subsequent picketing to obtain such a clause, violated section 8(b)(3) of the National Labor Relations

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5. The Joint Conference Board or the trustee, as the case may be, shall collect all income received by reason of interest or otherwise derived from the investment or deposit of said funds.

6. The income shall be disposed of as follows:

   a. Payment of all expenses for administration of said fund.

   b. Payment of taxes of all kinds.

   c. Any balance of income shall be paid to the Pension Trust.

7. The depositing contractor or Association shall bear the tax assessments on capital gains on his proportion of said fund, if any, and shall also pay any other taxes levied on his proportionate share of said fund, if any.

8. A valuation of the principal fund shall be made quarterly to determine gain or loss affecting the contractor's deposit.

9. The trustee, if acting at the designation of the Joint Conference Board, shall disburse the principal or any portion thereof at the direction of the Joint Conference Board, and in order to pay any contractor's obligations as hereunder stated, said disbursements by the Joint Conference Board shall be made in the amounts and to the payee as directed.

10. The refund of the contractor's deposit upon direction of the Joint Conference Board shall be less any authorized principal disbursements, after which the balance would be revalued according to the profit or loss indicated by valuation of the principal fund.

11. All income, after payment of expenses, fees and taxes shall be distributed to the Pension Trust annually and at the termination of this Agreement. Said income be distributed to the Pension Trust even though by revaluation of the fund there has been determined to be a capital loss. That is to say, the income under no circumstances shall be used to reduce any capital losses or for the purpose of paying any portion of disbursements for wages, welfare, or any levy directed by the Joint Conference Board.

Act, 29 U.S.C. § 158(b)(3). The order requires that the respondent cease and desist from its insistence upon the inclusion of a performance bond clause in its contract with Boggs or upon Boggs' compliance therewith and that it return to Boggs the certified check which he had delivered to Tarr. The order further requires that if the check has been cashed the respondent shall repay its face amount, together with interest from the date of cashing. Respondent contends that the determination that its conduct violated section 8(b)(3) was erroneous.[2]

Section 8(b)(3) of the act imposes upon a labor organization and its agents the duty to bargain collectively with the employer[3] Section 8(d), which defines that duty, requires that the employer and the representatives of the employees "confer in good faith with respect to *wages, hours, and other terms and conditions of employment*. . . ." (Emphasis supplied.) While collective bargaining need not be confined to the italicized subjects, called "mandatory subjects," the refusal to enter into an agreement on the ground that it does not include some proposal which is not one of the "mandatory" subjects of bargaining constitutes a violation of the duty to bargain collectively. *Labor Board v. Borg-Warner Corp.*, 356 U.S. 342, 349, 2 L.Ed.2d 823, 78 Sup.Ct. 718 (1958). It was only by application of this rule that the Board determined that respondent had committed an unfair labor practice. The Board expressly rejected a finding by the Trial Examiner that the respondent had been guilty of a general refusal to bargain in good faith by adopting a "take it or leave it" attitude. 150 N.L.R.B. at 161-163.

Respondent's main contention here is that the performance bond provision falls within the range of mandatory bargaining subjects and that, therefore, insistence therefor is not improper. It also urges that, even if the subject is non-mandatory, its insistence upon the clause was not of such a nature as to justify application of the rule of *Borg-Warner*. Agreement was not prevented by its demand for a performance bond, respondent argues, but by the inability of the parties to agree on several proposals, some clearly within the area of mandatory bargaining. We have examined the record. It fully supports the Board's determination that the failure of negotiations resulted from respondent's insistence upon a contractual provision for a performance bond. Our decision must turn on whether respondent's particular performance bond proposal was a subject included within the language, "wages, hours and other terms and conditions of em-

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[2]Additionally, respondent asserts that since the check was issued to provide security to several labor unions jointly, the order against the respondent alone, where the other beneficiaries of the security arrangement were not joined as parties respondent, is inappropriate. We do not reach this contention.

[3]Section 8(a)(5), 29 U.S.C. § 158(a)(5), imposes the reciprocal duty to bargain upon the employer.

ployment." If not, the finding of unfair labor practice must be upheld.

Petitioner contends that the status of performance bonds as non-mandatory subjects is settled, and, indeed, the assertion has been made by the courts. See, *e.g., N.L.R.B. v. Davison,* 318 F.2d 550, 555 (4th Cir. 1963). We have discovered only one decision, however, in which such a broad statement of the proposition was necessary to the result which was reached. In *Carpenters' District Council of Detroit,* 145 N.L.R.B. 663 (1963), *enforced,* 58 L.R.R.M. 2064 (D.C. Cir. 1964), the Board held that "insistence upon any performance bond . . . is *per se* an unlawful refusal to bargain." 145 N.L.R.B. at 667. With the exception of that case, the decisions cited by petitioner in support of its position are distinguishable from the matter at bar. *Jasper Blackburn Products Corporation,* 21 N.L.R.B. 1240 (1940), the progenitor of the line of authority upon which petitioner relies, declared that the employer, by insisting upon a performance bond, had refused to bargain in good faith. In that case, however, the underlying reason for the decision was the determination that the purpose of the employer's insistence for the bond was to thwart agreement generally.[4] Offering a proposal with such intention and purpose, regardless of the mandatory or non-mandatory nature of the subject matter of the proposal, constitutes an unfair labor practice. See *N.L.R.B. v. Herman Sausage Co.,* 275 F.2d 229 (5th Cir. 1960). As to the performance bond itself in *Jasper Blackburn,* the only characteristic which the Board found objectionable was that the employer was enabled, as a condition to agreement, to require, in effect, that the union "pay a tax to a surety company. . . ." 21 N.L.R.B. at 1254. That particular objection is inapposite in the instant case,[5] as a cash bond was

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[4]"Since the respondent had in 1937 stated its intention not to sign any agreement, and since none of the proposals advanced either by the respondent, or by the Union, called for any performance whatsoever on the Union's part, it would seem clear that the primary purpose of the respondent's demand for a bond was to avoid the required fundamentals of collective bargaining." 21 N.L.R.B. at 1254-55.

[5]Also inapplicable to the instant case, and for the same reason, is the rationale of *N.L.R.B. v. American Compress Ware, Div. of Frost-Whited Co.,* 350 F.2d 365 (5th Cir. 1965), *cert. denied,* 382 U.S. 982 (1966), cited by petitioner. The court wrote,

> "The Company cannot insist to the point of impasse upon an agreement with any person (*including a surety*) other than the Union which is the exclusive bargaining representative for the employees." (Emphasis supplied.) 350 F. 2d at 370.

accepted, *Jasper Blackburn* did *not* hold that a performance bond clause does not relate to "wages, hours, and other terms and conditions of employment."

The decisions in *N.L.R.B. v. Davison, supra,* and *Local 164, Brotherhood of Painters v. N.L.R.B.,* 293 F.2d 133 (D.C. Cir. 1961), *cert. denied,* 368 U.S. 824, 7 L.Ed.2d 28, 82 Sup.Ct. 42 (1961), which declared performance bonds to be non-mandatory subjects, appear to us to have derived from the scope of the particular bonds involved in those cases. The proposal in *Davison* was held non-mandatory because it "related to security for the contracting party . . . *rather than relating to a benefit or security for the employees.*" 318 F.2d at 556. (Emphasis supplied.) In *Local 164* the union's proposed bond was payable "to the union in the event . . . *that said contractor has committed any substantial breach of this agreement or* has failed to comply with any of the terms or conditions of employment specified thereunder." (Emphasis supplied.) This language, noted the court, indicated that the union itself, in drafting the particular bond provision, recognized that the coverage was to extend beyond "terms and conditions of employment." 233 F.2d at 135. Neither of the objections presented by the facts of these two cases can here be seen. Our examination of the foregoing authorities leads us to the conclusion that there must be case by case determination of whether a particular performance bond proposal is to be classified as mandatory or as non-mandatory.

Here there is no suggestion that the proposed provision is unlawful, or that, if agreed to by the employer, it would be unenforceable. As we have prevously emphasized, the Board expressly overturned the Examiner's determination that the respondent had not bargained in good faith.

Resolution of the crucial issue, whether the subject of a performance bond falls sufficiently within the range of the relevant statutory language and is, therefore, a mandatory subject which may be disputed to impasse without engagement in unfair labor practice, should depend upon the nature and scope of the bond involved in a given case.[6] The bond here demanded by the

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[6]This approach harmonizes with the Supreme Court's view, expressed in *Borg-Warner,* that, even as to non-mandatory subjects of bargaining, "each party is free to bargain or not to bargain, and to agree or not to agree." 356 U.S. at 349. This broadly expressed freedom, however, may be illusory. A proposal on a non-mandatory subject may be offered, of course. If it is rejected, must the offeror not withdraw it, lest his insistence be construed as a refusal to bargain in good faith? See Duvin, *The Duty to Bargain: Law in Search of Policy,* 64 Colum. L. Rev. 248, 271-273 (1964); Feinsinger, *The National Labor Relations Act and Collective Bargaining,* 57 Mich. L. Rev. 807, 826-830 (1959).

respondent union, chargeable only for the payment of wages and fringe benefits which are conceded to be within the range of the mandatory subjects,[7] was clearly intended to insure that those payments would continue to flow without interruption. Its function binds it so closely to those payments that the bond can clearly and fairly be seen to relate, as do the payments themselves, to "wages, hours, and other terms and conditions of employment." Such a bond, not claimed to be unreasonably excessive,[8] may be insisted upon, even to impasse, if the insistence is in good faith.

We hold that the record, devoid of determination that the respondent's demand was intended to prevent agreement, or was otherwise indicative of actual bad faith in bargaining, does not support the conclusion that an unfair labor practice was committed.

Enforcement denied.

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[7]In his Intermediate Report to the Board in the instant case, the Trial Examiner, while recognizing the significance of the scope of the bond, was disturbed by the provision that the bond should be chargeable for "liquidated damages." 150 N.L.R.B. at 178. These "damages," provided for in paragraph (D)(1) of Article V of the contract, are assessed for failure to make timely payment into certain employee fringe benefit funds. They are payable to the particular funds. In effect, then, the bond provides an alternative mode of payment to funds conceded to be within the range of mandatory bargaining subjects. This aspect of the performance bond does not, therefore, compel a determination that it is not a subject included by the statutory language, "wages, hours, and other terms and conditions of employment."

[8]We agree with the Board that public policy in favor of the collective bargaining process, reflected in the National Labor Relations Act, would not permit such demands for performance bonds as would significantly favor "financially responsible parties." See *Carpenters District Council of Detroit, supra,* 145 N.L.R.B. at 664. A finding of general refusal to bargain in good faith might be inferred, quite properly, from a party's insistent proposal for a bond excessive in amount or containing unreasonable terms or terms not clearly related to "wages, hours, and other terms and conditions of employment."

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 899

INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, LOCAL NO. 1082, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1–10) is reported at 384 F. 2d 55. The Board's decision and order (R. 62–74, 35–57)[1] are reported at 150 NLRB 158.

JURISDICTION

The opinion of the court of appeals was rendered on September 29, 1967 (Pet. App. 1). The petition for

[1] "R." references are to the materials contained in Volume I of the record in the court of appeals; "Tr." references are to the transcript of testimony in Volume II of the record; "G.C. Exh." refers to the General Counsel's exhibits.

a writ of certiorari was filed on December 11, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly concluded that the union committed an unfair labor practice by insisting, as a condition to entering into a collective bargaining agreement, that the employer provide a cash bond that would cover actual and liquidated damages resulting from a default by him or his subcontractors in providing the employee benefits specified in the contract.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at page 11 of the Appendix to the petition.

STATEMENT

In June 1962, petitioner Union presented a proposed new collective bargaining contract to E. L. Boggs Plastering Company ("Boggs") (R. 39; Tr. 166–168, G.C. Exh. 7).[2] Article X of the contract contained the following provision (G.C. Exh. 7, p. 13):

> A cash bond in the amount of One Thousand Dollars ($1,000) shall be deposited by the individual Contractor with the Joint Conference Board, or a trustee designated by the Joint Conference Board. Said bond shall be liable for any assessment for wages, vacation payments, liqui-

[2] The previous agreement between Boggs and the Union had expired on May 31, 1962 (R. 39; Tr. 91).

> dated damages as provided for in this Agreement, and/or contributions for medical, hospital, welfare and life insurance plans, pension plan and for employee benefits as provided for in this Agreement, as directed by the Joint Conference Board after hearing and vote as provided for in this Contract.[3]

The contract further provided that both liquidated and actual damages could be assessed against the bond if the contractor failed to make the monthly contributions or reports to the health and welfare, pension, and vacation funds required by the contract (R. 48–49; G.C. Exh. 7, pp. 10, 13, 14). The contractor's bond also covered any failure of a subcontractor to pay his employees the wages and benefits provided in the agreement (R. 48–49; Tr. 202).[4]

Boggs declined to sign the contract and designated a multi-employer association to represent it in negotiations with the Union (R. 39; Tr. 93–94, 96–97). The parties held four bargaining sessions, from July through December 1962 (R. 63; Tr. 55, 68, 74). Throughout the meetings, the Union demanded, and Boggs opposed, the performance bond clause (R. 39–40, 42, 44–45; Tr. 55–56, 59, 62–63, 76, 78–79, 178–179, 196).

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[3] The contract empowered the Joint Conference Board (composed of seven contractors and seven union representatives) to invest up to 75 percent of the cash bonds deposited (G.C. Exh. 7, pp. 14, 17). After payment of expenses, fees, and taxes, the balance of the income derived from such investments was to be distributed to the pension fund, and could not be used to meet assessments against the bonds for employee benefits due under the agreement (G.C. Exh. 7, p. 15).

[4] The agreement permitted a contractor to subcontract under certain conditions (G.C. Exh. 7, p. 2).

In October 1962, the Union threatened to strike unless Boggs signed the contract (R. 45; Tr. 97). On January 3, 1963, the Union picketed a job site where Boggs was working (R. 46; Tr. 105–106). The next day, Elmer Boggs, the owner of the Company, agreed to the contract. It was understood that in lieu of providing a cash bond he could give a certified check, which would be held uncashed until the Union and the multi-employer bargaining group agreed upon a bond for the group (R. 46; Tr. 108–109).[5] Boggs did not deliver the check, and on March 21, 1963, the Union resumed picketing (R. 46; Tr. 116). The next day, Boggs gave the Union the check, and the Union stopped picketing (R. 46; Tr. 116).

The Board held that the bond clause was not a mandatory subject of bargaining under the Act; that the Union had insisted on the inclusion of such a clause as a condition of reaching an agreement on mandatory subjects; and that such insistence constituted a refusal to bargain, in violation of Section 8(b)(3) of the Act (R. 48–49, 71). The Board ordered the Union to cease and desist from insisting that Boggs comply with the bond clause of the contract, to return the check to Boggs or to refund its face value plus interest, and to post appropriate notices (R. 72).

The court of appeals enforced the Board's order (Pet. App. 1–3). The court held that substantial evidence supported the Board's finding that the Union

[5] The so-called area contract provided that, in lieu of the $1,000 cash bonds required of individual employers, multi-employer cash bonds of $10,000 and $20,000 might be furnished (G.C. Exh. 7, p. 13, Art. X, B).

insisted upon the posting of a performance bond as a condition of an agreement with Boggs (Pet. App. 1, 7). The court (with Judge Ely dissenting on this issue) also sustained the Board's determination that the performance bond was not a mandatory subject of bargaining. The court stated that the Board "did not hold all performance bond clauses to be nonmandatory subjects of bargaining," and that the clause here involved "would have required the contracting employer to pay liquidated damages and to guarantee payment of wages and fringe benefits due the employees of subcontractors of the contracting employer" (Pet. App. 2).

ARGUMENT

The decision of the court of appeals is correct and is not in conflict with other decisions. There is no occasion for further review.

1. The holding of the court of appeals that the performance bond clause was not a mandatory subject of bargaining because it did not relate to "wages, hours, and other conditions of employment" is in accord with the decisions of five other courts of appeals that have upheld the Board on this issue.[6] This Court repeatedly has declined to review such rulings (*supra*, n. 6), and there is no greater reason for review here.

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[6] *National Labor Relations Board* v. *Tower Hosiery Mills, Inc.*, 180 F. 2d 701 (C.A. 4), certiorari denied, 340 U.S. 811; *Standard Generator Service Co.* v. *National Labor Relations Board*, 186 F. 2d 606 (C.A. 8); *National Labor Relations Board* v. *Dalton Telephone Co.*, 187 F. 2d 811 (C.A. 5), certiorari denied, 342 U.S. 824; *National Labor Relations Board* v. *Taormina*, 207 F. 2d 251 (C.A. 5); *National Labor Relations Board* v. *F. M. Reeves & Sons, Inc.* (C.A. 10), No. 6125, Jan-

Petitioners (Pet. 18–21) and the dissenting judge below would distinguish those cases on the ground that the purpose of the clause here was to insure compliance by the employer with its contractual obligations to its employees. As the court of appeals pointed out, however, the Board found that the clause "would have required the contracting employer to pay liquidated damages and to guarantee payment of wages and fringe benefits due the employees of subcontractors of the contracting employer" (Pet. App. 2). The requirement that the employer pay liquidated damages for its failure to make prompt payments or reports to the various trust funds goes beyond the mere protection of the wages and other benefits accorded the employees in the bargaining unit covered by the contract. Such damages were in addition to any actual damages suffered by unit employees from the employer's default, and the extra amount was payable into trust funds for the benefit of all employees covered by the so-called area contract. Simi-

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uary 19, 1961, 47 LRRM 2480, certiorari denied, 366 U.S. 914; *National Labor Relations Board* v. *Davison*, 318 F. 2d 550 (C.A. 4); *Local 164, Brotherhood of Painters* v. *National Labor Relations Board*, 293 F. 2d 133 (C.A. D.C.), certiorari denied, 368 U.S. 824; *National Labor Relations Board* v. *American Compress Warehouse, Division of Frost-Whited Co.*, 350 F. 2d 365 (C.A. 5), certiorari denied, 382 U.S. 982; *Carpenters District Council of Detroit* v. *National Labor Relations Board*, 58 LRRM 2064 (C.A. D.C.), enforcing 145 NLRB 663.

See, also, *Jasper Blackburn Products Corp.*, 21 NLRB 1240; *Scripto Mfg. Co.*, 36 NLRB 411; *Interstate Steamship Co.*, 36 NLRB 1307; *Dalton Telephone Co.*, 82 NLRB 1001; *International Brotherhood of Teamsters, Local 294 (Conway's Express)*, 87 NLRB 972, affirmed on other grounds *sub nom. Rabouin* v. *National Labor Relations Board*, 195 F. 2d 906 (C.A. 2).

larly, the requirement that the employer guarantee the wages and other benefits of the employees of subcontractors does not relate to the "wages, hours and other terms and conditions of employment" of the members of the bargaining unit. Cf. *United Mine Workers* v. *Pennington,* 381 U.S. 657, 666; *National Labor Relations Board* v. *Davison,* 318 F. 2d 550, 557 (C.A. 4).

2. Petitioners contend (Pet. 8–14) that, since the performance bond clause itself was not illegal, the Union could properly exert economic pressure to obtain such a clause whether or not it related to "wages, hours and other terms and conditions of employment" (Pet. App. 11). This contention is foreclosed by *National Labor Relations Board* v. *Borg-Warner Corp.,* 356 U.S. 342. There this Court distinguished between mandatory subjects of bargaining, *i.e.,* those relating to "wages, hours, and other terms and conditions of employment," as to which bargaining is required but "neither party is legally obligated to yield"; and permissive subjects of bargaining, *i.e.,* those relating to other legal demands, as to which either side may make proposals but cannot "lawfully insist upon them as a condition to any agreement." 356 U.S. at 349. The Court has continued to recognize this distinction. See *Fibreboard Paper Products Corp.* v. *National Labor Relations Board,* 379 U.S. 203, 210; *Local Union No. 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.,* 381 U.S. 676, 689. The fact that the Union sought to attain its demand for a nonmandatory subject by picketing and a strike threat is immaterial;

although the Act accords these economic weapons a special solicitude, they are not protected where, as here, they are used to further an illegal bargaining objective. See *Local 164, Brotherhood of Painters* v. *National Labor Relations Board,* 293 F. 2d 133 (C.A.D.C.), certiorari denied, 368 U.S. 824, cited with approval in *United Mine Workers* v. *Pennington,* 381 U.S. 657, 697, 712, n. 19 (dissenting and concurring opinion of Mr. Justice Goldberg).

3. There is likewise no merit to petitioners' argument (Pet. 14–17) that the Union properly could press its demands relating to the nonmandatory subject of bargaining because it was, at the same time, also insisting on mandatory subjects. Where insistence on a nonmandatory subject has contributed to an impasse in the bargaining, as petitioners' insistence on the performance bond clause admittedly did here, it is immaterial that the nonmandatory subject was not the only issue on which the parties had not reached agreement. *National Labor Relations Board* v. *American Compress Warehouse, Division of Frost-Whited Co.,* 350 F. 2d 365, 369 (C.A. 5), certiorari denied, 382 U.S. 982; *Industrial Union of Marine and Shipbuilding Workers of America* v. *National Labor Relations Board* (*Bethlehem Steel Co.*), 320 F. 2d 615, 618 (C.A. 3), certiorari denied, 375 U.S. 984; *Philip Carey Mfg. Co., Miami Cabinet Div.* v. *National Labor Relations Board,* 331 F. 2d 720, 728 (C.A. 6), certiorari denied, 379 U.S. 888. "It is the *tendency* of such proposals [on nonmandatory subjects] to 'delay or impede or otherwise circumscribe the bargaining process,' which renders [insistence

upon] them improper." *International Brotherhood of Teamsters, Local 294 (Conway's Express)*, 87 NLRB 972, 979, affirmed on other grounds *sub nom. Rabouin* v. *National Labor Relations Board,* 195 F. 2d 906 (C.A. 2). Petitioners' hypothetical dilemmas (Pet. 16–17) about how a union could strike in support of proposals on mandatory subjects when a nonmandatory subject is still under negotiation or how it could withdraw a nonmandatory bargaining proposal once impasse has been reached, may be avoided by the simple expedient of not coupling demands relating to the statutory subjects of bargaining with those involving a nonmandatory subject.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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